TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 91.

HUGH HARTEN, PLAINTIFF IN ERROR,

vs.

ERNST LÖFFLER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 20, 1907.

(20,724.)

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1 In the Court of Appeals of the District of Columbia.

No. 1727.

HUGH HARTEN, Appellant,
vs.
ERNST LOFFLER.

Supreme Court of the District of Columbia.

No. 47806. At Law.

ERNST LÖFFLER
vs.
HUGH HARTEN.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

Declaration.

Filed June 20, 1905.

In the Supreme Court of the District of Columbia.

No. 47806. At Law.

ERNST LOFFLER
vs.
HUGH HARTEN.

1. The plaintiff sues the defendant for that, whereas the said defendant on the 27th day of April, A. D. 1905, and for some time prior thereto, was the owner, and was possessed, of a certain tract or parcel of ground situate on what is known as Brightwood Avenue, near Battleground Cemetery, in the District of Columbia, which real estate was improved by certain houses and buildings, in which the said defendant, being thereto lawfully authorized and licensed by the municipal authorities of said District, did conduct and carry
2 on a saloon, inn and tavern and retail liquor business in which he sold and disposed of intoxicating and other liquors and beverages, and which said business so conducted by the said defendant, as aforesaid, was largely lucrative and profitable, and plaintiff avers that on the said 27th day of April, A. D. 1905, said defendant did enter into an agreement in writing, signed by the said

defendant and his wife, Julia Harten, whereby he agreed to sell to the plaintiff at and for the sum of Twelve Thousand dollars ($12,000.00), the said property and real estate, and the good will and fixtures of, as also the liquor license for, said business aforesaid, and did in and by the said writing aforesaid, acknowledge the receipt of Two Hundred and fifty dollars ($250.00) paid to him on account of the purchase price aforesaid, the said sum of Two Hundred and Fifty dollars ($250.00) being then and there actually paid by the plaintiff to the defendant.

And the plaintiff says that although he is, and ever since the said 27th day of April, A. D. 1905, has been prepared, able, willing and ready to pay to the defendant the said purchase price, and comply in all respects with said agreement of purchase, and did tender the same in lawful money of the United States to the said defendant, yet the said defendant has refused, failed and neglected to convey and transfer to the plaintiff the real estate aforesaid, as also the fixtures, good will and licenses for said business, and has failed, neglected and refused in any respect to comply with his said agreement, although thereto duly requested, to the damage of the plaintiff in the sum of Twenty Thousand dollars, ($20,000.00).

And the plaintiff claims the sum of Twenty Thousand dollars ($20,000.00) and the costs of this suit.

2. And the plaintiff sues the defendant for that, the said defendant on the 27th day of April, A. D. 1905, and for a long time prior thereto, was the owner, and was possessed, of a certain tract or parcel of ground situate on what is known as Brightwood Avenue near Battleground Cemetery, in the District of Columbia, which said real estate was improved by certain houses and buildings, in which the said defendant, being thereto lawfully authorized and licensed by the municipal authorities of said District, did, on the day and year aforesaid, conduct and carry on a saloon, inn, tavern, and retail liquor business, and had, for a long time prior thereto, conducted and carried on the same, and which said business, so conducted by the said defendant as aforesaid, was largely lucrative and profitable, and had attached thereto a large patronage and custom, and the plaintiff avers that on the said 27th day of April, A. D. 1905, the said defendant, by his agreement in writing, signed by him and his wife, Julia Harten, agreed to sell to the plaintiff, for the sum of Twelve Thousand dollars ($12,000.00), Two Hundred and fifty dollars ($250.00) whereof was then and there paid by the plaintiff to the said defendant, and the receipt thereof acknowledged, the said property, real estate and the good will, license and fixtures of said business aforesaid.

And the plaintiff says, that although he has ever since the said
27th day of April, A. D. 1905, been prepared, able, willing
3 and ready to pay to the said defendant, the balance of the
said Twelve Thousand dollars ($12,000.00) to wit, Eleven Thousand seven hundred and fifty dollars ($11,750.00) and in all respects to comply with the said agreement of purchase, and did, to wit, on the sixteenth (16) day of May, A. D. 1905, tender, in lawful money of the United States, to the said defendant, the balance of

the said purchase money, yet the said defendant has failed, neglected and refused, and does fail, neglect and refuse to convey and transfer to the plaintiff the real estate aforesaid, as also the fixtures, good will and licenses for said business so sold by him to the plaintiff as aforesaid, and has failed, neglected and refused, and does fail, neglect and refuse to comply with the said agreement, although due demand to do so has been made by the plaintiff of him, whereby and by reason of the neglect, failure and refusal of the said defendant to comply with his said agreement, the plaintiff has lost the use and occupancy of the said real estate as aforesaid, and the profits and income which he would have derived therefrom, and has been deprived of, and has lost great profits which he would, otherwise have received in the conduct of the said business sold by the defendant to the plaintiff as aforesaid, and has otherwise been greatly damaged and injured to the damage of the plaintiff in the sum of Twenty Thousand Dollars ($20,000.00).

And the plaintiff claims the sum of Twenty Thousand dollars ($20,000.00) and the costs of this suit.

3. And the plaintiff sues the defendant for that, to wit, on the 27th day of April, A. D. 1905, the plaintiff was desirous of engaging in the business of conducting an inn, tavern, saloon and the retail liquor business in the District of Columbia, which fact was communicated by plaintiff, and was well known to the defendant, and the defendant being the owner of a certain tract or parcel of ground situate on what is known as Brightwood Avenue near Battleground Cemetery in the District of Columbia, which was improved by certain houses and buildings in which the said defendant, who was thereto lawfully authorized and licensed by the municipal authorities of said District did conduct and carry on thereon and therein an inn, tavern, saloon and the retail liquor business, from which large profits were derived, the said defendant did, on the said 27th day of April, A. D. 1905, by his agreement in writing signed by him and his wife, Julia Harten, agree to sell to the plaintiff the said real estate, and the good will, and fixtures as also the license for the said business as aforesaid, at and for the sum of Twelve Thousand dollars ($12,000.00), Two Hundred and fifty dollars ($250.00) whereof was on said date paid by the plaintiff to the said defendant, whereof said defendant did duly acknowledge the receipt.

And the plaintiff avers that on to wit, the sixteenth day of May, A. D. 1905, he did duly tender to the said defendant the balance of the said purchase money, and did present to the said defendant, for execution by him and his wife, a properly prepared conveyance of the said real estate, and the good will, fixtures and license of the said business, but the said defendant wholly disregarding his

4 written agreement as aforesaid, did fail, neglect and refuse and hitherto, has failed, neglected and refused to perform and carry out his said agreement, and to execute the conveyance aforesaid and to convey and transfer to plaintiff, the said real estate, good will, fixtures and license so agreed to be sold to plaintiff as aforesaid, although the plaintiff has been prepared, able, willing and ready to pay to the said defendant the said purchase money and in all respects to comply with the said contract of purchase.

And plaintiff avers and says that the said defendant has failed, neglected and refused to comply with his said agreement, although due demand to do so has been made of him by the plaintiff, and that by reason of the default and refusal of the said defendant as aforesaid, the plaintiff has lost the use and occupancy of the said real estate, as aforesaid, and the profits and income which he would have derived therefrom, and has been deprived of, and lost great profits, which he would have otherwise received in the conduct of the business as aforesaid sold by the defendant to him, and has been put to great outlay and expense, and otherwise has been greatly damaged and injured; to the damage of the plaintiff in the sum of Twenty Thousand dollars ($20,000.00).

And the plaintiff claims the sum of Twenty Thousand dollars ($20,000.00) and the costs of this suit.

LEON TOBRINER,
PRESTON B. RAY,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth (20th) day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

LEON TOBRINER,
PRESTON B. RAY,
Attorneys for Plaintiff.

Pleas of Defendant.

Filed July 10, 1905.

In the Supreme Court of the District of Columbia.

No. 47806. At Law.

ERNST LOFFLER
vs.
HUGH HARTEN.

1. For a plea to each count of the plaintiff's declaration the defendant says he did not agree or promise as the plaintiff has therein alleged.

2. And for a further plea to the said declaration and to each count thereof the defendant says that the plaintiff at the commencement of this suit was and still is indebted to the defendant in the sum of Twenty thousand dollars, for that, whereas, heretofore, to wit, on the 27th day of April, A. D. 1905, the defendant was the owner and possesser of a certain tract or parcel of land situate in the District of Columbia fronting on what is known as Brightwood Avenue near Battle Ground Cemetery (also called Battle Cemetery) having a width of about 85 feet at the front on said avenue and a depth of about 235 feet from said front to the rear of

said parcel of land; the southern 60 feet of which said parcel of land at said front by a depth of 200 feet was then improved by a certain house, called the "bar room," and other buildings in which the defendant was then carrying on a bar-room business under a certain license previously granted and issued to him by the proper authorities of said District for that purpose, and in which said buildings the defendant had in his possession certain fixtures used in said business and owned by him. And the defendant avers that he then entered into a certain agreement in writing with the plaintiff, signed by each of them, whereby the defendant agreed to sell to the plaintiff and the plaintiff agreed to purchase from the defendant for the sum of Twelve thousand dollars to be paid by the plaintiff to the defendant, the said Southern 60 feet front of said tract by the depth of 200 feet aforesaid, together with the license and fixtures aforesaid and the good will of said business, and the plaintiff then paid to the defendant $250. on account of said purchase price. And the defendant further avers that he is and has been at all times willing, ready and able to fully perform said agreement on his part to be performed, as the plaintiff ever well knew, and has duly offered to the plaintiff to perform the same; But the plaintiff ever since then refused and refuses to pay to the defendant the balance, consisting of $11,750 of said purchase price, although thereunto requested by the defendant and the defendant was thereby injured and damaged in the sum of $20,000 for which sum he claims judgment against the plaintiff and he is willing that the same may be set off against the plaintiff's demand.

LORENZO A. BAILEY,
Attorney for Defendant.

Replication.

Filed July 29, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47806.

ERNST LOFFLER
vs.
HUGH HARTEN.

The plaintiff joins issue with the defendant on his first plea.
For replication to the defendant's second plea he says:
6 First. That he is not indebted as alleged.
Second. He did not undertake and promise as alleged.

LEON TOBRINER,
Attorney for Plaintiff.

Joinder in Issue.

Filed July 31, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47806

ERNST LOFFLER
vs.
HUGH HARTEN.

The defendant joins issue upon each of the plaintiff's replications to the defendant's second plea.

LORENZO A. BAILEY,
Attorney for Defendant.

Memorandum.

March 7, 1906.—Verdict for plaintiff for $1250.00, with interest on $250.00 from April 27, 1905.

Supreme Court of the District of Columbia.

MONDAY, *April 2nd*, 1906.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

No. 47806. At Law.

ERNST LOFFLER, Plaintiff,
vs.
HUGH HARTEN, Defendant.

It is hereby ordered that this term be, and the same is hereby prolonged thirty eight days, to allow submission of Bill of Exceptions.

Supreme Court of the District of Columbia.

FRIDAY, *May* 4, 1906.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

7 No. 47806. At Law.

ERNST LOFFLER, Plaintiff,
vs.
HUGH HARTEN, Defendant.

Upon consideration of the motion for a new trial filed herein, it is ordered that said motion be and is hereby overruled, and judgment on verdict be entered. Thereupon, it is considered and adjudged that the plaintiff herein recover of the defendant herein the sum of Twelve Hundred and Fifty Dollars ($-250.00) with interest on Two hundred and Fifty Dollars thereof, from April 27th, 1905, being the money as aforesaid found payable by said defendant to said plaintiff by reason of the premises together with costs of suit to be taxed by the Clerk and have execution thereof.

From the aforegoing the defendant by his attorney in open court notes an appeal to the Court of Appeals and prays that bond be fixed, whereupon, said defendant is hereby required to furnish bond on such appeal herein to operate as a sepersedeas in the sum of Two Thousand Five Hundred Dollars with surety or sureties to be approved by this Court.

Memoranda.

May 15, 1906.—Appeal bond, supersedeas, filed.
May 16, 1906.—Bill of Exceptions submitted.
May 29, 1906.—Time to file transcript of record in Court of Appeals extended to and including October 1, 1906.

Supreme Court of the District of Columbia.

THURSDAY, *May* 31*st*, 1906.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

No. 47806. At Law.

ERNST LOFFLER, Plaintiff,
vs.
HUGH HARTEN, Defendant.

Comes now the defendant herein by his attorney Mr. L. A. Bailey, and presenting to the Court the Bill of Exceptions heretofore submitted, prays that the same be signed and made of record now, as of the time of the trial herein, and the noting thereof, which, is accordingly done and so ordered.

8 *Bill of Exceptions.*

Filed June 1, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 47806.

ERNST LOFFLER
v.
HUGH HARTEN.

Be it remembered, that upon the trial of the above entitled cause before the Honorable Thomas H. Anderson, one of the Associate Justices of this Court and a jury begun and had on the 27th day of February, A. D. 1906, and thereafter continuing from day to day until and concluded on the 7th day of March, A. D. 1906, evidence was adduced on behalf of the plaintiff to prove that in April, 1905, the defendant was the owner of the following described land situate in the District of Columbia and described as part of the tract known as Girl's portion, beginning for the same on the line of 7th street road now called Brightwood Avenue at the corner of a lane, being the northeast corner of Brainard's tract and running thence along said avenue south 7¾ degrees west, 85 feet, thence north 82½ degrees west, 224 feet to Brainard's north line, thence north 77 degrees east, 239.50 feet to the beginning; being the same property conveyed to the defendant by deed recorded June 26, 1897 in the Land Records of said District and also by deed recorded May 7th, 1898 in said Land records and also described in a deed of trust executed by the defendant and his wife to Walter A. Johnson and Salvador S. Richard dated May 2nd, 1898 and recorded May 7th, 1898, in said Land Records to secure an indebtedness due from the defendant unto Richard & Co. in the sum of $4700., which said deed of trust covers the said real estate together with all the goods, chattels, implements and other personal property of every description upon said premises.

The plaintiff produced as witness in his behalf WILLIAM S. BOUSCAREN, who testified that he was employed in the Assessor's Office of the District of Columbia as a draftsman and did the engineer's work of the assessor's office. That he was acquainted with the Harten property and had made measurements thereof, and also prepared the map, Exhibit A, which was then offered in evidence, and which showed the lines of the property; that the said parcel of land comprises 9,520 square feet and is improved by several buildings; that the main building has a front of 51½ feet upon Brightwood Avenue leaving unoccupied at the northeast corner of said parcel a triangular piece of land fronting 13½ feet on Brightwood Avenue and a strip south of said building 20 feet in width and opening upon

Brightwood Avenue and used as a drive way having over it
9 at the entrance from Brightwood Avenue a sign with the words, "Summer Garden" in large letters; that a line adjoins said parcel of land on the north; that the south line of said parcel with Brightwood Avenue form a right angle.

That measuring from the south line of the property on the front, north sixty feet, would bring the end of the line in part of the door way of the north building, marked with a red cross indicated in the picture, offered and admitted in evidence, 11½ feet south of the northeast corner of the building, leaving 40 feet of the building within the line of 60 feet. Upon cross-examination witness said he used the official records of the Assessor's Office in making his measurements and that such records were prepared and made by the Surveyor of the District. The plat prepared by the witness and offered in evidence shows the location of the house and grounds.

And thereupon further to maintain the issues on his part joined the plaintiff introduced a witness in his behalf, CHARLES D. HOOD, who testifies as follows:

I am engaged in the wholesale liquor business. I know the plaintiff and the defendant. I have known the defendant about ten years. His place of business on Brightwood Avenue is about one-half mile above the Brightwood Hotel and on the west side of the Avenue across from Battle Cemetery. The defendant conducts a liquor business there. Sometime prior to April 27, 1905, he called on me in relation to this property and said he had a place for sale. I got Mr. Loffler to go there to see it.

Thereupon Mr. Tobriner, attorney for the plaintiff, asked the witness the following:

"What did he say to you?" To which question Mr. Bailey, attorney for the defendant, objected upon the ground that the same was immaterial. Thereupon Mr. Tobriner said: "Now I propose to show by this witness that Mr. Harten on a number of occasions imprótuned this witness to obtain a purchaser of the property for him; that as the result of this request on the part of Mr. Harten the witness went to see Mr. Loffler and advised him of the fact that the property was for sale; that in the conversation between Mr. Hood and Mr. Harten the latter requested Mr. Hood to obtain a purchaser for his business and property; that he wanted to sell the whole place; that this request and the fact that the whole of the property and the business was for sale was communicated by Mr. Hood to Mr. Loffler who thereupon went into negotiations with Mr. Harten. This testimony is to explain the contract and apply it to its proper subject matter. I want to show that the defendant requested the witness to obtain a purchaser and that the witness occupied the relation of agent for the defendant in the matter to that extent. I will show among other things that the witness was engaged in selling restaurants and saloons and Mr. Harten went to him to obtain a purchaser for the place telling him what he wanted to sell and that the witness went to Mr. Loffler and put him in communication with Mr. Harten."

Thereupon Mr. Tobriner asked the following:

10 Q. "What did Mr. Harten say to you in respect to the sale of that place; what he wanted you to do?"

To which question the defendant by his attorney then and there objected upon the ground that the same was immaterial and that the evidence sought to be adduced thereby was incompetent; but the Court overruled the objection and permitted the witness to answer the question subject to exception and thereupon the witness testified in answer to said question as follows:

A. Mr. Harten came to me and told me that he wanted to sell his place and I asked him what he wanted for it and he said $12,000. I said what are you going to sell. He said the property and the business. I said what will you take for your business and rent the property. He said when I sell my business I want to sell everything I want to get out of the neighborhood; I cannot live there; the people harass me to death and I cannot do business. His license was a little entangled. I communicated what Harten said to me to Loffler.

To which ruling of the Court in overruling the said objection the defendant by his attorney then and there duly excepted and the said exception was at the same time duly noted by said Justice upon his minutes.

Upon cross examination the witness Hood further testified as follows:

This conversation with Mr. Harten occurred about two weeks or maybe a month before Mr. Loffler bought the place. I do not know anything about a contract in writing being signed between Mr. Loffler and Mr. Harten. I am interested in the matter in the way of commission. Mr. Harten promised me a commission. I made the sale to Loffler. When Loffler made application for his license he told me he had bought the property. I did not take Mr. Loffler out to see the property. I told Harten that Loffler was coming. Harten told me he wanted to sell the property and business including the stock in the trade and everything. He did not tell me he would not sell his stock in trade. Every year since Harten has been there, there has been difficulty in getting the license renewed on account of protests against such renewal. I have never made any claim for commission for making this sale. It did not go through; but if it goes through I will expect my commission.

Thereupon the plaintiff further to maintain the issues on his part joined testified as follows:—

Direct examination:

Q. "Did you have any negotiations with Mr. Harten in respect to the purchase of his place of business on Brightwood Avenue?"

To which question the defendant by his attorney then and there objected upon the ground that all negotiations merged in the written contract; but the court overruled the objection and said the plaintiff may show, if it be true, that Mr. Hood went to him and informed

him that this property was for sale and whatever Harten
11 authorized Mr. Hood to say to him; to which ruling of the Court the defendant by his attorney then and there objected upon the same ground last above mentioned but the Court overruled said objection; to which rulings of the Court and each of them the defendant by his attorney then and there duly excepted and the said exception was at the same time duly noted by the said Justice upon his minutes.

A. Yes, after I first found out from Charles Hood that Harten wanted to sell the property. Then I had a conversation with Mr. Richard about it. After that I went to Mr. Andrew Loffler who was then in the Real Estate business. I sent him out to negotiate with Mr. Harten. Andrew Loffler had been to see Mr. Harten I had a conversation with Harten through the phone. I told him I was coming up to buy his place and he said it was all right. On the strength of that I went right out with Mr. Richard in his buggy. I also phoned to Andrew Loffler and he was at Harten's place when we got there. We met Mr. Harten there. We talked about buying the property. Two days before this Andrew Loffler and I were out there and Mr. Harten showed us the property. At that time I examined the property.

We went through the house and he showed us upstairs where he had a little kind of ball-room, and then we came down and went through his storage room and through the kitchen and from there we came out through the bar room and the pool room and then we came to the back to the middle part of the back, called the little summer garden and with that he left us and went back to the house. Andrew Loffler and I walked out on the outside of the south side of the house and around on the north side of the house and back in the house and into the bar-room again. This was a few days before we made the deal.

To which testimony the defendant by his attorney then and there objected as incompetent and immaterial but the Court overruled the objection and to the ruling of the Court in overruling said objection the defendant then and there duly excepted and the said exception was at the same time duly noted by the said Justice in his minutes.

The plaintiff then offered in evidence the following paper writing; being the contract mentioned in his declaration, formal proof of which was waived by the defendant:

APRIL 27, 1905.

For and in consideration of the sum of twelve thousand dollars two hundred and fifty dollars whereof is hereby acknowledged I hereby agree to sell to Ernst Loffler the property, good will, license and fixtures, located on Brightwood Avenue near Battle Ground Cemetery, fronting on Brightwood Avenue about 60 feet with a depth of about two hundred feet, title and transfer of license guaranteed or deposit refunded. I agree to use my best efforts to secure the signers for the transfer of said license and to give said Loffler a clear title to all of above property.

HUGH HARTEN.
JULIA HARTEN.

12 To the introduction of which paper writing in evidence the defendant by his attorney then and there objected upon the ground that the plaintiff claims that he purchased all the real estate in question having a front of 85 feet with a depth of 224 feet on one side and 239½ feet on the other side and that the alleged contract is a- variance and does not correspond with the plaintiff's claim as regards the dimensions of the real estate; but the Court overruled the said objection and permitted said paper writing to be read to the jury in evidence and the same was then read to the jury in evidence subject to exception; to which ruling of the Court in overruling said objection and in permitting the said paper writing to be read in evidence to the jury the defendant by his attorney then and there duly excepted and the said exception was then and there duly noted by the said Justice in his minutes.

Thereupon the plaintiff further testified as follows: That contract was written by Mr. Salvador Richard.

Thereupon the defendant by his attorney objected to all testimony in regard to said contract upon the same grounds last above stated, which objection was overruled by the Court; to which ruling of the Court the defendant by his attorney then and there duly excepted, which exception was then and there duly noted by the said Justice in his minutes.

Thereupon the plaintiff further testified as follows: He wrote it in the little room back of the bar, in the presence of Andrew Loffler, Mr. Harten and myself.

(By Mr. TOBRINER:)

Q. "From whom did Mr. Richard get his instruction or information as to what to put in the paper about the description of the property?"

To which question the defendant by his attorney then and there objected upon the same grounds last above stated, and as incompetent and immaterial, but the court overruled the said objection; to which ruling of the Court the defendant by his attorney then and there duly excepted and the said exception was then duly noted by the said Justice in his minutes.

Thereupon the witness answered the question as follows:

A. Why, from Mr. Harten; he was standing in the room.

Q. "What did Mr. Harten say in respect to the front and depth of the property when Mr. Richard was writing this paper?"

To which question the defendant by his attorney then and there objected upon the same ground last above stated and that the plaintiff must stand upon the contract as it is written, but the Court overruled said objection; to which ruling of the court the defendant by his attorney then and there duly excepted and the said exception was then duly noted by the said Justice in his minutes.

A. He said it was about 60 ft. in front and about 200 ft. deep. Those were all the words that were said. Mr. Harten brought his

liquor license in from the bar room into the little room where
13 we were and told Mr. Richard "you can copy it off of this. This will be the best description of the place. That is the way it lies."

Mr. BAILEY: "I object and I want my objection to go to all this evidence."

The COURT: "I overrule your objection and you can have your exception."

To which ruling of the Court the defendant by his attorney then and there duly excepted and the said exception was then duly noted by the said Justice in his minutes.

The witness further testified as follows: The next time I went to Harten's place was probably a week after that. I was out there with my wife the next day after we made the deal. We met Mr. Harten and his wife there. Mrs. Harten signed the paper about 10 minutes after Mr. Harten signed it.

Q. "What, if anything, did Mr. Harten say to Mrs. Harten before she signed it?"

To which question the defendant by his attorney then and there objected upon the same grounds stated in the preceding exceptions but the said objection was overruled by the court; to which ruling the defendant by his attorney then and there duly excepted and the said exception was by the said Justice then and there entered upon his minutes.

A. Mrs. Harten came downstairs and walked into the room. Harten said to her "I want you to sign this contract. I sold the place." Mr. Richard handed the paper to her and she looked over it and then Mr. Richard took the paper back in his hands and read it out to her and then she signed.

The defendant by his attorney then objected to so much of the answer as relates to the statement of what Harten had sold, and moved the court to strike out the same upon the same grounds stated in the preceding exceptions but the Court overruled the said objection and motion; to which ruling of the Court the defendant by his attorney then and there duly excepted and the said exception was then noted by the said Justice in his minutes.

Q. "State what Mr. Harten did, if anything, about showing you and your wife over the property the next day?"

To which question the defendant by his attorney then and there objected upon the grounds stated in the preceding exceptions and as inadmissible but the Court overruled said objection; to which ruling the defendant by his attorney then and there duly excepted and the said exception was then noted by the said Justice in his minutes.

A. We walked into the summer garden by the entrance on the south side of the property and as we got back toward the back bar-room door Harten came out of the door and said "come through here" and we walked through the bar room and Harten took us

through the place. He took us substantially through the
14 same rooms he had taken me through previously; through the whole building. Afterward I went to the District Building and made application for a transfer of the license from Harten to myself. I gave the application to Andrew Loffler and he got all those signatures upon it. We went out again to try and get Mr. Harten to sign.

Mr. BAILEY: "This goes in under the same objections and exceptions."

The COURT: "It goes in under your exceptions."

(Witness continuing:) Mr. Ray and Andrew Loffler and myself went out there and presented the application to Mr. Harten. I asked him to sign it and to let me have the license he then had so I could have it transferred to me. He looked at it a little bit and finally said he would not sign. He gave no reason for refusing to sign. He said I won't sign a damn thing. He refused to sign. He said "you have not enough signers." Sometime afterwards, it was in May, I went out there with Mr. Ray and showed Mr. Harten the deed which we wished him to sign. He looked at it and said he would not sign anything. I don't think he read it over because he did not have it in his hands long enough. Mr. Ray was talking to him more than I was. Of course I did not say anything about it. We were then ready to settle with him. Mr. Ray had the funds. Mr. Ray told him that we had come out to settle up this matter and he wanted him to sign this deed. He said he would not sign any more papers. There were very few words said.

Q. "Now in these preliminary negotiations which you had with Mr. Harten before these papers were signed did Mr. Harten say to you what was the amount of business he was doing there?"

To which question the defendant by his attorney then and there objected upon the ground that the same was irrelevant and inadmissible but the Court overruled said objection; to which ruling of the Court the defendant by his attorney then and there duly excepted and the said exception was then noted by the said Justice in his minutes.

A. $75. a day and some Saturdays $125. (Continuing) When I was negotiating with Harten for that place I was the owner of a saloon business in Georgetown. The day I went out with Andrew Loffler before I made this purchase I talked with Harten about my business in Georgetown.

Q. "What did you tell him?"

To which question the defendant by his attorney then and there objected upon the ground that the same was irrelevant but the Court overruled the objection; to which ruling of the Court the defendant by his attorney then and there duly excepted and the said exception was then noted by the said Justice in his minutes.

A. I said, "I will have to dispose of that before I can buy this."
There was nothing more said about it. I sold my saloon to
15 Mr. Tom McCullough the same day Harten and his wife signed the contract.

Q. "Was this business you had in Georgetown a profitable one or not?"

To which question the defendant by his attorney then and there objected upon the ground that the same was irrelevant and inadmissible but the Court overruled the objection; to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was by the said Justice then duly noted in his minutes.

A. Yes, sir.

Mr. BAILEY: "If the Court please, so much time has been taken up in discussing objections, I would like to have an understanding that I need not object to each question and answer as it goes in where it is subject to the general objection as to all this line of testimony."

The COURT: "When questions are asked that come within an objection you have already made and which objection has been overruled by the Court and to which you have noted an exception it is not necessary to make any other objection or exception."

Mr. BAILEY: "I want it understood with the Court that when a question comes within a specific objection that I am not waiving it."

Q. "How long were you out of business after you disposed of your business in Georgetown?"

Mr. BAILEY: "That is all objected to and exception noted."

The COURT: "I understand."

A. About 5 months. During that time I made several efforts to get into business. I finally got into business; the saloon business and restaurant at 1908 Pa. Ave. I bought it from Charles Rupertus. I have been in the saloon business about 17 years. I am conversant with the value of saloon properties. I think this is the fourth saloon property I bought in 17 years. About 12 or 13 years ago I had a saloon on Brightwood Avenue beyond Harten's place. I am acquainted with that neighborhood. I have frequently been in Harten's place of business.

Q. "How much was Harten's business worth leaving out the real-estate?"

To which question the defendant by his attorney then and there objected upon the same grounds before stated and also because it is not shown that the witness is competent to testify to the value of the business as an expert, but the Court overruled the objection; to which ruling the defendant by his attorney then and there duly excepted and the said exception was then noted by the said Justice in his minutes.

A. According to what Mr. Harten said he was taking in there, it ought to be worth between $10,000 and $11,000. This is what we would have to pay in town for a business of that kind easily.

16 Q. "Taking into consideration your knowledge of the rental value of property of that kind in the District of Columbia what would be a fair rental for this property?"

To which question the defendant by his attorney then and there objected upon the same grounds before stated and because it is too promiscuous and too general but the Court overruled the objection; to which ruling the defendant by his attorney then and there duly excepted and the said exception was then noted by the said Justice in his minutes.

A. I should think a place of that kind that takes in money like that would bring $125 or $150 a month anywhere in the District. I know what I am paying and I don't take in that much.

Upon cross examination the plaintiff further testified as follows:

Q. "Do you mean to say $125. or $150. a month would be a fair rental for Mr. Harten's place out there at the time you presented the deed to him to be signed?"

A. According to the money he told us he was taking in I think it is worth it. The only reason I told Hood not to tell Harten I wanted the business was because I thought he would not want me to have the place because I was well acquainted out there and maybe he would feel that I would do a little more business than he did and would have a hard feeling. The first time I went through Harten's place was not over a week before he signed the contract. Harten signed the contract within ¾ of an hour after my telephone conversation with him. I would not say for sure that it was Harten at the phone but it sounded like his voice. I asked him over the phone if he was satisfied for me to come out and make the deal. He said all right come out. After that I signed my contract with Mr. McCullough. Mr. Richard came to my place with Mr. McCullough and after I phoned out to Harten I signed the contract with McCullough and then I went out with Mr. Richard to Harten's place. I had very little to say there.

Q. "Can you recollect that you said, if anything, to Harten?"

A. I merely said I would like to get it a little less than that. What will go with that? He said I will sell everything here except the stock and you cannot have the stock for that money. I said all right let it go for that.

Thereupon the defendant by his attorney moved the Court to strike out so much of the answer as purports to state what Harten said to the witness upon the ground that the same is not responsive to the question, but the Court overruled the said motion; to which ruling the defendant by his attorney then and there duly excepted and the exception was then noted by the said Justice in his minutes.

The witness was then shown the memorandum written at the bottom of the agreement in these words, "I hereby agree to accept the above contract and will purchase the property on the same terms and conditions. Ernst Loffler."

The witness further testified that said memorandum was written there by Mr. Ray and signed by the witness at Mr.
17 Ray's office about a week after the contract was signed by Harten; and the plaintiff by his attorney admitted that the same was so written and signed after the defendant's refusal to sign the deed.

(Witness continuing:) When Harten showed my wife and myself through the place we went inside the store room where he had a stock of goods stored. He showed us over the house. I wanted to see what I was buying. That is in the new part of the house on the north side of the house. Right after the paper was signed by Harten and his wife, Richard and Andy Loffler and I left his place and went right over to the Villa Flora Club. I cannot remember that anything was then said about giving Harten a copy of the contract. I did not know that he asked for a copy. I never heard him ask for a copy. I think the north part of the building was built on when George Woods owned the place. Before and during Woods' time the business was conducted in the old part of the buildings at the front next to the 20 foot drive way adjoining the bar room and north of which, in the front of the building, is a little room called the sitting room. Between that and the new part of the building is a hall way with an entrance by a door at the front of the building. The bar room business and license is the principal thing that I was after. The business is no good without the license. I would not say that the old part of the building would be sufficient for the same business that Harten was doing. What would suit Harten would not be big enough for me because I would do a different business.

Q. "What, you want to do a better business than $75. a day?"

(Witness continuing:) I only got that from Mr. Harten. I don't know what he got. I only know what he told me and Andrew Loffler. When Harten told me the receipts were $75. a day he was right behind the bar. I did not see any bar tender there that day.

Q. "Is it not a fact, after you saw the condition of things, no bar tender and Harten tending to it himself, when he told you, if he did, that his receipts were $75. a day, that you knew it was not true?"

A. I cannot say. I don't think it was impossible. I believed what the man told me.

Q. "Did you believe he was taking in $75. a day?"

A. It was a good place; I knew that.

(Witness continuing:) His exact words in reference to his receipts were, "I have taken about $75. in here a day and taken in about $125. on Saturday."

Q. "Did you ask him whether that meant $75. every day?"

A. I did not ask him any questions at all.

Q. That is the only information you had about Harten's receipts there and the amount of his business, is it?"

A. I never inquired any more after that. I never asked anybody else.

Q. "Didn't you ask Mrs. Harten and didn't she say to you that he took in from $25. to about $30. a day?"

A. Not as I know of; No, sir.

Q. "Why didn't you make any other inquiry about the receipts or profits of that business?"

18 A. Well, because I am familiar out there in that neighborhood of the country. I drive out there so often and used to do business out there.

Q. "And you knew what the business was worth or ought to be worth?"

A. Yes: I think I knew what it was worth to me because I am acquainted out in that neighborhood.

(Witness continuing:) To carry on a business of $75. a day the necessary expenses are bar room license $800 a year. The Government license and cigar license cost $37 a year. To carry on a business of $75 a day and $125 on Saturdays the proprietor and one bar tender can do the business. The expenses of a bartender would be per week $10. and $5. or $6. more for his board. About ½ of the receipts is profit. If Harten's receipts there would average about $150. a week it would not be a profitable business. There would be practically nothing in it by the time you paid expenses.

Q. "There would be no value to the business if that were the average receipts?"

A. There would not.

Q. "Why didn't you make further inquiry as to the receipts of that business?"

A. Well I said awhile ago I am familiar with the place out there and I did not care anything about it because I knew just about what he did out there. I was pretty well acquainted. I knew as much about it as Harten did.

Q. "And you were able to tell without figures from him?"

A. I had my opinion.

(Witness continuing:) I have been past Harten's place, up and down, many and many a time. I have a farm out there now and I drive out there to my farm and store. Richard went out there with me for the purpose of writing that contract. When Richard was writing the contract he asked Mr. Harten, how much ground is in this place. We all were guessing and Mr. Harten said put it down about 60 ft. and about 200 ft. deep and Mr. Richard said all right we will put it down that way.

Q. "You are sure that is the exact language?"

A. I am certainly sure that is what was said. I do not know that there was any provision in my contract with McCullough that it would not stand unless I got the Harten place. At the same time when Harten signed the contract I deposited with him the $250 therein mentioned. When I went out with Andy Loffler and Mr. Ray with the application for a transfer of the license I said to Harten "I have all the signers if you sign this application for the license." I would not say for sure, but I do not remember that he asked to see the contract he had signed. I cannot say whether or not Harten asked to see the contract when we asked him to sign the deed. We did not have a Notary Public with us. The time when Harten showed my wife and me about the place we did not stay there probably more than half an hour. It was regarded by Harten and his wife as more of a friendly visit than anything else. Business was talked about. I heard my wife say she was satisfied with the place. In the different conversations I had with Mr. Harten there we talked about the license because that was the most important thing, the business.

Q. "In all the conversations between you and Mr. Harten
19 was there ever anything said about the amount of real estate he was selling to you?"

A. "Only the time when the agreement was made."

Q. "I am not asking about any talk between Richards and you but between you and him?"

A. "Never."

Q. I will ask you now if it is not a fact that at the time you signed that contract all you expected was the old part of the building—all the real estate contained in the old building?

A. I expected to get all I bought. I bought the whole thing there. That is what I expected to get.

Q. That is what you expected to get?

A. Why certainly.

Upon Redirect Examination the plaintiff further testified as follows:

Q. "When you went out there and talked with Mr. Harten about buying this place did he tell you he expected to keep a portion of this property for himself?"

A. "No, sir."

To which question and answer the defendant by his attorney then and there objected upon the ground that the same were inadmissible and irrelevant and that the answer of the witness was given before counsel could interpose and object thereto and the defendant by his attorney then and there moved that said answer be stricken out upon the same grounds; but the Court overruled the said objection and motion; to which ruling the defendant by his attorney then and there duly excepted and said exception was then and there by said Justice noted in his minutes.

(Witness continuing:) I expected to get the whole tract of land the whole house and everything that belonged to the tract of land. Mr. Richard went out with me for the purpose of writing that agreement. Mr. Richard is in the wholesale liquor business. He is not a lawyer. He took me out in his buggy. I said to him he might as well write it as anybody else and he did write it.

And next the plaintiff further to maintain the issue on his part joined gave in evidence the testimony of ANDREW LOFFLER as follows:

In April, 1905, among other things I was engaged in the Real Estate business. I was a member of the firm of Little, Loffler & Jarrell. I know Ernst Loffler. I am slightly related to him.

Q. "What was said to you by Mr. Harten as to what he had for sale?"

Mr. BAILEY: I object to this upon the same grounds previously stated."

(Witness continuing:) Mr. Loffler came to me and said he was trying to get a place located on Brightwood Avenue and that he heard that Mr. Harten's place was for sale. I went to see Harten and introduced myself. I told him I was in the real estate business

and that I could get him a customer. I asked him how much he wanted for his place and he told me $12,000. I asked him what was included and he said the property, the fixtures, at least everything except the pool tables and his stock. I then went to
20 see Mr. Loffler and reported what Mr. Harten had told me. After that I told Harten I had a purchaser for the place. About a week before the agreement was signed I took Mr. Loffler out and showed him the place.

We looked over the property; Mr. Harten took us through the whole building on the place; he showed us all the different rooms he had; he took us in the bar room and then back from the bar into a small sitting room; there is one part of the house where the roof is elevated, which they call the new part; the other is the old part; we went into the bar room in the old part; from the bar room we went into the sitting room which is also in the old part and then we went into the store room in the new part; that took us in all the whole front of the new building, the front on the north side; then we went upstairs over the store room, the room used as a ball room for dances; and from that room we went downstairs; we did not go into the sleeping rooms because his wife was in there; downstairs we went into the kitchen, which is back of the new part; back of the kitchen is a kind of a shed and back of the shed is the pool room; the kitchen is back of the new portion of the building, on the north side, and back of that is the pool room he took us through all these places; he wanted to show us the property what he had; he took us out in the yard and left us there; he said he had to go in and attend to business; the last thing he showed us was the wind mill. Mr. Loffler and myself continued around the place and examined different parts of the building and went out in the rear and walked around the buildings. The subject matter of conversation between Loffler and Harten was, he was to sell Loffler the whole property—everything except the stock. I went out most every evening after that to speak to Mr. Harten about trying to get the deal through. I got it through the day the agreement was signed.

Q. "Just tell us the circumstances attending the preparation and the writing of the paper? Tell us from the beginning, how it happened to be written, how it was written, and all about it?"

Mr. BAILEY: "This goes in under my previous objection."

The COURT: "Yes, the objection is overruled and you have your exception."

A. We met there and called Mr. Harten in. I told him that Mr. Loffler was satisfied to close the deal; that he had a deposit with him and everything was satisfactory. Some body asked me to write the agreement but I thought I would have nothing to do with it and have no trouble. Mr. Richard agreed to write it because he was familiar with that kind of business. When he came down to describe the place Mr. Harten told him it was described in the license. Harten brought the license in. The description in the license is "Opposite Battle Ground Cemetery." Mr. Richard put that down and said that we should describe the property a little plainer. He said, "What is the square number or what is the number of the lot."

Harten said there is no number to the lot. He did not know the number of the square. So he said we better put down the
21 number of feet you have here. Somebody asked me what my idea was and I said about 60 ft. I walked and looked out of the window to size it up. Mr. Loffler made a guess, and we all made a guess. Harten said put down about 60 ft. We estimated about 60 ft. front and about 200 ft. deep.

Q. "Who estimated about 200 ft.?"

A. Nobody. He says just put down 200 ft. Harten signed the paper and called Mrs. Harten down from upstairs. He said to her, I want you to sign this paper. Mr. Richard read it to her and she was satisfied and she signed it. After that I tried to get the signers for the transfer of license.

Q. "Tell us what you did so far as getting Mr. Harten to sign?"

Mr. BAILEY: I object. This goes in under my general objections and exceptions."

(Witness continuing:) We needed one more signer, I believe, which was Mr. Orme next door. We could not get his signature. About the middle of May I went to Mr. Harten and asked him to sign the application and told him that his was all I needed and everything would be all right. He would not sign.

He did not say much at first. Then he told me he did not like to sign on account of his wife. That his wife might object to it. That she refused to sign any more papers and that he did not want any family trouble. I saw him about 5 or 6 times about signing. I then told Mr. Loffler I did not think there was any more use to go to see Mr. Harten. After that I went out with Mr. Ray and Mr. Loffler and they asked Mr. Harten to sign the application for transfer of license. He said he would sign nothing. He refused to endorse the license. After we left I came back to Mr. Harten and told him I sold the place and got him his customer and that it would be right for him to come to see me. He would not listen to that. He called me in the back room and said, "Loffler, is there no way you can get me out of this." I said, I have not much to do with it now; Mr. Loffler is the man now. Harten said, "I will give you $100 if you will get me out of this. You can do it." He threw a check book down and said "you take a check for $100 and call it off." I said I didn't think I could do anything like that and I went home. The next time I saw him was when we met there with Mr. Ray and Mr. Loffler. Mr. Ray told him he came out to close the deal and had $12,000 with him and he was ready to close the deal; that all he had to do was to sign the deed. Harten told him his wife would not sign it. They said they were satisfied if he would sign it. He said he would not sign anything. He would sign no papers.

Q. "Were you present at any interview between Loffler and Mr. Harten when Mr. Harten stated to Mr. Loffler the amount of business he was doing out there or what his daily receipts were out there?"

A. Yes.

Q. "When was that?"

A. That was the day I brought Mr. Loffler to Mr. Harten.

Q. "What was said."

The defendant by his attorney then and there objected to said question and moved that all evidence as to what the defendant
22 stated to the plaintiff as to the receipts from the business be stricken out upon the ground that it appears by the plaintiff's own testimony that he did not rely and had no reason to rely on said statements of the defendant; that he had abundant opportunity to ascertain for himself; but the Court overruled said objection and said motion; to which ruling of the Court the defendant by his attorney then and there duly excepted and the said exception was by said Justice noted in his minutes.

A. He said he done a good business there. That it was the only saloon from that point up. It was the first and last chance. He said he done $75. a day and $125 on Saturdays; about that. He did not say exactly; he said about that much.

(Witness continuing:) After the day when we went out there with the deed, I went to see Harten several times to see if I could not run the deal through but he would not listen to it. Finally he said "Loffler has got a lawyer and I have got a lawyer and I am willing to give him 60 ft. That is all he bought. This was about a week or so after Mr. Ray had been out there.

Upon cross examination the witness further testified as follows:

I have a suit now pending against Mr. Harten for commissions for making this sale. I don't know anything about the liquor business. When we asked him to sign the transfer I cannot say that Harten did or did not ask to see the contract. I did not see it. He did not ask me for a copy. He might have asked Mr. Loffler or Mr. Ray for it but I never heard him.

And next the plaintiff further to maintain the issues on his part joined gave in evidence the testimony of SALVADOR S. RICHARD as follows:

I am engaged in the wholesale liquor business with Richard & Co. in this City. Mr. Harten is a customer of ours and so is Mr. Loffler. I wrote the contract of Harten for the sale to Loffler. I wrote it on April 27, 1905, at Mr. Harten's place on Brightwood Avenue. In a manner it is part of our business to find places that are for sale for prospective customers. Mr. Harten had spoken to me about selling his place probably a month before this agreement was written; probably longer than that. The day the agreement was signed Mr. Loffler and I drove out in my buggy from his place in Georgetown to Harten's place to close the deal for the purchase of Harten's place of business. I was interested in a financial way. Harten was indebted to my firm for merchandise and a deed of trust on the property for an original loan made when he purchased the property. Loffler wanted to sell his place in Georgetown and to buy a saloon on Brightwood Avenue. I offered to loan him some money if he needed it to buy this place with.

Mr. BAILEY: "I want to reserve my objection to all this line of testimony connected with the terms of the contract."

The COURT: "Yes."

(Witness continuing:) When Loffler got out to Harten's place I was asked by the two parties to draw up an agreement which
23 both of them could sign. I don't remember the conversation. I was there probably 10 or 15 minutes before I was asked to write the paper. I then wrote it. The sale of Loffler to McCullough had been made that day. I advanced by a check the $250 deposit made by McCullough. Loffler had the check and Harten agreed to accept it as a part of the purchase price. I drew up the paper based on my knowledge and ability just in this manner.

Q. "When you got down to describing the property or real estate from whom did you get the information about the front and depth?"

A. So far as I recollect I wrote as far as license, fixtures located on Brightwood Avenue near Battle Ground Cemetery" and I turned then and asked what is the size of this place? There was a sort of general discussion that arose between Mr. Loffler and Mr. Harten and myself and the other Mr. Loffler. Some one suggested it was about 60 ft. Just who that was I am unable to say; I don't remember. We all assented to that. Mr. Harten agreed and said "that is about right" and the figures were put in that way.

On cross examination the witness Richard further testified as follows:

During this conversation we were in the little parlor or sitting room in the old building next to the bar. A door leads from that room into the bar. North of that little room is a hall way. I cannot say that Harten was the one who suggested 60 ft.

Q. "Was anything said there in the presence and hearing of Mr. Harten to indicate to him that the purpose was to describe the whole of that tract or only that part where the business was? Was there anything said to call Harten's attention to the fact, if it was a fact, that Loffler was expecting to get it all?

A. No particular words were used to that effect.

Q. Only that you probably thought it was intended to cover the whole?

A. Yes.

(Witness continuing:) I joined in a deed to Harten when he bought that property about 1898. It was put up at public sale by trustees and sold and I bought it in and assigned my purchase to Mr. Harten. I signed the deed to him. The property was described in the deed by metes and bounds and the dimensions given. Since that time Harten gave a deed of trust on the same property to secure my firm. When I signed the deed I must have known what the description was in it. When I wrote the contract between Harten and Loffler I may have known what the description was but am not prepared to say that I remembered it. I may have forgotten it. There was then due from Harten to my firm nearer $6000 than $5000. $3800 of that was on account of the old purchase price. Harten bought the property for $6000. That was for the real estate and he paid nothing extra for the business. He got it all for $6000. At the time of the signing of the agreement at Harten's I was there between ½ or ¾ of an hour. During that time we had several drinks first and then wrote the paper and had several more drinks and drove away. Mr. Ernst Loffler asked me to write the agreement.

He asked me first when we first started out to draw up such
24 an agreement. I then suggested he better take a lawyer to draw up the paper in case there was a purchase but he seemed to think that that was an unnecessary expense, relying upon my ability to draw a proper paper. After Harten signed he went upstairs and brought Mrs. Harten down. I read the paper over to her and she signed it in a few moments.

Q. "Don't you remember you went out after her and found her in the kitchen and she said she would go in when she fixed up a bit, and it was you that asked her and not he?"

A. I remember some sort of a talk with Mrs. Harten before the paper was drawn up.

Q. "Is it not a fact that you had that talk with her out in the kitchen and she refused to go in until she first fixed herself?"

A. I think that is correct.

And next the plaintiff further to maintain the issues on his part joined gave in evidence the testimony of PETER J. MAY, as follows:

I know the plaintiff and the defendant. I have been to the defendant's place of business several times. Sometime last April I met Mr. and Mrs. Ernst Loffler there. Mr. Harten brought Mr. Loffler in there and gave me an introduction to him and said that Mr. Loffler bought him out; that he sold out the business; that he did not want his wife behind the bar and was going out of town. He said he had sold the whole place. Mr. Loffler brought us through the house. He showed us through the house and Mrs. Loffler made arrangements then how she was going to arrange the house.

On cross examination the witness testified: Mr. Harten said he sold the whole business out, everything, the ground and all and was going out of business. And Mrs. Loffler asked me if I had seen the house and I said No. And she said, come on and go through. And Mr. Loffler and Mrs. Loffler and Mr. Harten went through the house and she laid out what she was going to do, how she would fix the house up. (186) 187); we went through every room in the house even the stock room, in the back part, and the kitchen. Mr. Harten said he had sold everything, I am getting out of business and getting out of the place altogether.

And next the plaintiff further to maintain the issues on his part joined gave in evidence the testimony of Mrs. ANNA LOFFLER as follows:

I am the wife of the plaintiff. In April last I was at Mr. Harten's place one time. I went there with my husband. Mr. Harten took us through the house. This was one or two days after the date of my husband's contract with Mr. Harten. We said we came out to look over the place.

Mr. BAILEY: "Of course this goes in under the same objections."

(Witness continuing:) We went out of the bar into the little sitting room and we went in front of another little room, a kind of another room back, and from the hall into the store room, and he showed us the store room with the wire netting. This was in the

front part of the building the north side; from there we went up to the ball room which is above the store room. There are two
25 stairways there. Mr. Harten took us all over the building, we went up one steps and came down the other; he took us in the kitchen and in the pool room back of the kitchen. Mrs. Harten was behind the bar. After Mr. Harten had shown us through the place I saw Mrs. Harten and asked her if she objected to her husband selling the business and property and she said "No." Mr. Harten was standing right there within hearing.

Upon cross examination the witness, Mrs. LOFFLER further testified as follows:

I heard the testimony of Mr. May in this case. Mr. Harten said he sold his place; he sold everything. Mrs. Harten said her friends and neighbors advised her to get out of the business; that her husband was not capable of running it. Mr. Harten was standing right there but he did not say "nothing."

And next the plaintiff further to maintain the issues on his part joined gave in evidence the testimony of ROBERT L. MONTAGUE as follows:

I am an attorney and associated with W. J. Dugan in the brokerage business. The specialty of the firm is in the Excise business, selling saloons and hotels. I have been engaged in that business about 4 years. In that time I have negotiated the sales of about 100 properties. I am familiar with the market value of saloon property in this District. I know the Harten place on Brightwood Avenue. The market value of that place would depend on what would be the rent of that property and how long the lease runs. That is a valuable asset in saloon properties.

Q. "What would that property rent for assuming that the business runs $75. a day and $125. on Saturdays?

Mr. BAILEY: "My objection goes to all this and exception noted."
The COURT: "Yes."

A. About $75. a month.

Q. "With the rent $75. a month what would be the market value of the property as an investment assuming it to be doing a business of from $50. to $75 a day and $125. on Saturdays?"

To which question the defendant by his attorney then and there objected on the ground that there is nothing in the evidence supporting the question that the Court overruled the objection; to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was then noted by the said Justice in his minutes.

A. With a lease there and the receipts on an average of $75. a day the property would be worth from $12000 to $15000; with the receipts from $50 to $60 a day the property would be worth about $10000. I refer to the saloon business.

Upon cross examination the witness, MONTAGUE, further testified as follows:

Q. "Suppose the receipts of that business were about $150 or $200 a week, what would you consider that business to be worth under the same conditions described in your previous answer."

A. I don't suppose it would be worth more than from $3000 to $5000. With a lease on the property it would be worth, approximately, at $30 a day, about $5000. In my previous answers I have included in the valuation an allowance for stock in trade at from $500 to $1000 and if there is no stock in trade that would reduce the valuation that much. You would not expect to pay $75. a month rent when the receipts averaged only $30 a day. But a place without any rent bringing in $30 a day would be worth from $5000 to $6000, thus making it all the more valuable when there are no fixed charges like rental. If he saves the rent it makes the place all the more valuable. If the receipts of a place are from $150 to $200 a week the rental value would be about $35 to $40 a month.

Further to maintain the issues on his part joined, the plaintiff introduced as a witness HENRY P. HELWIG, who testified as follows:

I am engaged in the brokerage buisiness, and make a specialty of the sale of saloons and hotels; I have been engaged in that business about six years; I am fairly well acquainted with the value of saloons in the District of Columbia; that is a saloon business, the license, the good will and trade; including the fixtures of the place I know the Harten place on Brightwood Avenue.

Q. Assuming that the daily receipts from that place were from $50 to $75 a day in April 1905 and $125 on Saturdays, I want you to give us what in your opinion would be the market value of that business. And when I say business, I mean license and good will and trade, including the fixtures of the place.

A. Well, the lease and rent ought to be designated. It depends a good deal on that.

Q. "If that place out there had been doing a business of from $50 to $75 a day, and $125 on Saturdays, what rent would a business like that be justified in paying for this purpose—what would be the reasonable rental value of the property?"

To which question the defendant, by his attorney, then and there objected upon the ground that it has not been shown that the witness is qualified to testify as an expert on the subject, and that there is no evidence of a lease, and no evidence to base the question upon. But the Court overruled the objection; to which ruling the defendant, by his attorney, then and there duly excepted; and the exception was noted by the Justice upon his minutes.

A. I think $75 to $100 a month. To a party buying that place or paying that amount of rent, and the daily receipts as stated in the question, the market value of the business, leaving out the realty, would be from $10,000 to $12,000.

Upon cross-examination, the witness HELWIG testified as follows:—

If the receipts from that place were from $150 to $200 a
27 week only, and the rent charge $40 a month, the fair market value of the business, for the license, good will, fixtures, without any stock in trade, would be $5,000 to $6,000.

Thereupon the plaintiff, by his attorney, offered in evidence a letter, dated May 23, 1905, addressed and sent to Mr. Preston B. Ray, attorney for Ernst Loffler, as follows:—

DEAR SIR: Enclosed herewith I send you the check of Mr. Hugh Harten drawn on the Second National Bank for $250. payable to my order as attorney and by me endorsed to the order of Ernst Loffler. This is sent to you as attorney for Mr. Loffler for the purpose of returning to him the $250. mentioned in his contract with Mr. Harten. Upon receipt hereof will you kindly cancel and return to me the contract referred to which appears to be unsatisfactory to both parties.

Very truly yours, L. A. BAILEY.

And thereupon the plaintiff by his attorney, also read in evidence a letter to Mr. L. A. Bailey, dated May 24, 1905, as follows:

MY DEAR SIR: I acknowledge the receipt of your favor of the 23rd inst. enclosing check of Hugh Harten for $250. which check is herewith enclosed. I am instructed to say that Mr. Loffler insists upon the performance by Mr. Harten of his contract, which you erroneously assume, appears to be unsatisfactory to both parties. Mr. Loffler is desirous of taking a conveyance of the property which was agreed to be conveyed to him by Mr. and Mrs. Harten, and I would thank you to inform me by the 26th inst. whether Mr. and Mrs. Harten will be prepared to execute the deed which was presented to them several days ago in consummation of that contract.

Yours very truly, PRESTON B. RAY.

Also a letter dated May 25th, 1905, addressed to Mr. Preston B. Ray, Washington Loan and Trust Company, City.

DEAR SIR: Your letter of the 24th inst. is at hand, returning to me the check of Hugh Harten for $250. In answer to your inquiry I have to say that Mr. and Mrs. Harten decline to reconsider their refusal to execute the deed which was presented to them and which you showed to me, and this refusal is based upon the fact that the deed is not in accordance with the contract. The discrepancy between the terms of the deed and the terms of the contract was the basis of my statement that the contract, "appears to be unsatisfactory to both parties," because the failure on the part of Mr. Loffler's attorney, in drawing the deed, to conform with the contract indicated dissatisfaction with the contract on Mr. Loffler's part, and such a construction of the contract on the part of Mr. Loffler is unsatisfactory to Mr. Harten.

Very truly yours, L. A. BAILEY.

28 Further to maintain the issues on his part joined, the plaintiff introduced as a witness PRESTON B. RAY, who testified as follows:

I am an attorney at law, and a member of the Bar of this Court; I know the parties to this suit. In the early part of May, 1904, I saw the defendant at his place on Brightwood Avenue; the plaintiff and Mr. Andrew Loffler were with me. We had with us an application for the transfer of the liquor license, and we asked Mr. Harten to sign the application as one of the property owners, and also as one of the necessary signers to the application; we also asked him to endorse the old license over to us so it might be filed. He first began to make some excuses. He said we did not have enough signers on our application. I told him that we had been assured that we had enough, and we were satisfied provided he would sign. Then he said his wife wasn't satisfied, or something to that effect. I then told him it looked to me as if he was trying to back out of his agreement to sell; he said No, he wasn't trying to back out of anything, but he wouldn't sign any more papers, or wouldn't sign a damned paper, or something of that kind. About a week or later after that I saw him again at his place; the plaintiff, and Andrew Loffler, Harten, McCullough and myself were present. I told him we had come out prepared to close the deal; that we had the deed prepared by the Lawyers Title Company of Washington, the proper description, &c., and I handed him the deed; he began to make excuses, that we didn't have enough signers on our application for transfer; I told him that wasn't the question; that we wanted to know if he was prepared to close the deal; he finally said No, he wasn't going to sign any more papers, that he wouldn't sign the deed. I told him we had come up prepared to close, and had the money with us to pay him for the property. He said he didn't want the money, and he wasn't going to close the deal. This (referring to a paper handed to the witness by plaintiff's attorney) is the deed that I took out with me. I don't know whether Harten read it. I handed it to him, but I don't think he read it; he glanced at it, but the chances are he didn't have time to read it. This was on the 16th of May.

Thereupon the plaintiff by his attorney, offered the said deed in evidence; to which offer the defendant, by his attorney, then and there objected, upon the ground that the description of the property called for therein does not correspond to the description as stated in the contract; but the Court overruled the said objection and permitted the said deed to be offered in evidence; and the same was read in evidence subject to the said objection; to which ruling of the Court the defendant, by his attorney, then and there excepted, and the exception was then and there duly noted by the Justice in his minutes. The said deed is in words and figures as follows:

This deed, Made this — day of May, in the year One thousand, nine hundred and five, by and between Hugh Harten and Julia Harten, his wife, of the District of Columbia, parties of the first part, and Ernst Loffler, of the same place, party of the second part:

29 Witnesseth, That in consideration of Twelve thousand ($12,000.) Dollars, the parties of the first part do grant unto

the party of the second part, in fee simple the following described land and premises in the County of Washington, District of Columbia, to wit: Part of a tract of land called "Girl's Portion:"—Beginning for the same on Seventh Street Road at the corner of a lane (being the northeast corner of Brainard's tract) and running thence along said road (now called Brightwood Avenue) South seven and three fourths degrees west (S. 7¾° W.) Eighty-five (85) feet; thence North, Eighty-two and one half degrees West (N. 82½° W.) Two hundred and twenty (224) feet to Brainard's north line; thence North, seventy-seven degrees East (N. 77° E.) Two hundred and thirty nine and fifty one-hundredths (239 50/100) feet to beginning, and being the same property conveyed to the said Hugh Harten by Deed recorded in Liber 2221 folio 494, *et seq.*, one of the Land Records of the District of Columbia.

Also, good will, bar fixtures and saloon license conducted and owned by the said Hugh Harten in and upon said premises, together with the improvements, rights, privileges and appurtenances to the same belonging.

And the said parties of the first part covenant that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said lands as may be requisite.

Witness our hands and seals the day and year hereinbefore written.

—— ——. [SEAL.]
—— ——. [SEAL.]

The next thing that occurred was a visit to my place a few days later by Mr. Bailey; he asked me to let him see the contract between Harten and Loffler. I showed it to him and gave him a copy of it. A few days later I received from Mr. Bailey a letter of May 23rd, which has been read in evidence; in reply to that I sent him the letter dated May 24, which has been read in evidence; and in answer to that I received from Mr. Bailey the letter dated May 25, which has been read in evidence.

Upon cross-examination, the witness RAY further testified as follows:

I was out at Harten's place only twice on this matter; on the first occasion nothing was said about the original contract except what I said. Harten did not ask me to show it to him. I told him that he had made a written agreement to sell this property, and, among other things, had agreed to do what he could to transfer the license, and, as a matter of fact, he had not done anything. It was stated at that time that they had tried to get Mr. Orme to sign the application. Harten said his wife could not get Orme to sign; that Orme refused; it was mentioned at the time that Orme's signature could not be obtained; Loffler said that he still had hopes. That is the Mr. Orme who lived just above Mr. Harten on the west side of the road. On the occasion of our first visit to Harten's nothing
30 was said about the description of the property contained in the deed. The deed calls for the whole of that property; the

whole tract, 85 feet front by the entire depth. That is the property owned by Harten.

Thereupon the plaintiff rested.

Thereupon, to maintain the issues joined on the part of the defendant, his attorney offered and read in evidence the said contract, dated April 27, 1905, with the said addition made to it and signed by the plaintiff Loffler; also the said deed, which was presented to the defendant for execution; also the said letters to Mr. Ray, dated May 23 and 25, and Mr. Ray's said letter of May 24; also the check and endorsement referred to in said letters, which said check and endorsement are as stated in said letters.

And next, the defendant further to maintain the issues on his part joined gave in evidence the testimony of ADAM R. BRADY as follows:

I live on Brightwood Avenue, near Hugh Harten's place; for the best part of two years I lived on the place of Mr. James B. Orme, about 150 or 200 yards from Harten's place. Mr. Orme died some time last summer.

(By Mr. BAILEY:)

Q. "Mr. Brady, in April last state whether or not any negotiations were pending between you and Mr. Harten for the purchase of that business."

To which question the plaintiff, by his attorney, then and there objected.

Mr. BAILEY: "The purpose of this testimony is to show that when this contract with Loffler was signed Harten already had an offer pending of $10,000; that he had placed, before the negotiations with Loffler had commenced, a price of $12,000 upon the business, fixtures, goodwill and license, and the old business portion of the property, reserving to himself the north end; that he was then engaged in negotiations with this witness, or somebody whom this witness represented, and those were his terms and reservations."

And thereupon the Court sustained the said objection and refused to permit the witness to answer the said question; to which ruling of the Court the defendant, by his attorney, then and there excepted; and the exception was then duly noted by the Justice in his minutes.

And next, the defendant, further to maintain the issues on his part joined, gave in evidence the testimony of LOUIS P. SHOEMAKER as follows:

I am engaged in the real estate business in the District of Columbia, buying and selling real estate for myself as well as for others; I am familiar with the values of property in the District of Columbia, including property lying along Brightwood Avenue. I have been engaged in that business since 1876. I know the defendant,
31 Harten; I have known him ever since he moved to the place where he now lives on Brightwood Avenue. I have seen his property there; I am able to form and state a correct opinion as to

the value of that real estate and the improvements on it,—I can give my estimation of its value. There is not much property up in that section that is offered by the foot; most of it is larger properties; in fact, there is very little property offered in so small tracts as an acre, up that way.

Q. "What is that land worth, being 85 feet front, and, in depth, 224 feet on one side and 229.5 feet on the other, and containing from 9300 to 9500 square feet?"

A. I should think that small piece of ground there would be worth about 25 cents a square foot, exclusive of the improvements upon it. I would say that the actual selling value, or purchasing value of those improvements, as they are in their present condition, is about $2,000; not more than that.

Upon cross-examination the witness, Shoemaker, further testified as follows:

The property on the south side of Harten's is acreage property, which runs away back. A triangular strip adjoining Harten's, and having the same dimensions, would be worth about the same price per square foot.

Q. "Then your opinion is based upon the value of the property as property, having no relation whatever to any income that may be derived from it, or any business that is carried on in it.

A. No, not at all.

Q. It is simply in the abstract?

A. Yes.

Q. If the house was unoccupied and the property simply stood there, the estimate you have given would apply to it?

A. Yes.

Q. Suppose Harten's property brought a rental of $75 a month, what would be the value of it in your opinion?

A. Well, I would want to be pretty sure it could be continually rented at that price; if I could be sure it could be continually rented at that price, I would capitalize it and find out its value. I would capitalize it at 7 or 8 per cent. A rental of $75 a month, or $900 a year, would be 8 per cent. of about $11,000; if the rental value was $40 or $50 or $60 a month, I would capitalize it on the basis of 8 or 10 per cent. Generally, I think property in that neighborhood has appreciated in the last six or seven years; but I saw some property sold out there the other day for less than it did ten years ago, but the general impression is that there has been an appreciation.

Q. So that when you say the ground was worth $.25 a foot and the improvements $2,000.00, you simply took the property as it stands, without regarding any income that is derived from it, or any income that might be derived from it, or the purpose to which it is put.

A. Yes.

Q. Simply as if you were taking the adjoining property?

A. I could not enter into any speculation as to what it could be used for. It might be rented for a certain price, but that would be another proposition.

Upon redirect examination the witness, Shoemaker, further testified as follows:

32 This particular piece of property of Harten's has not appreciated to any great extent in the last six or eight years; I don't know that there is anything around there to cause it.

Next, the defendant, further to maintain the issues on his part joined, gave in evidence the testimony of CHARLES D. HOOD as follows:

As stated in my previous testimony I am engaged in the wholesale liquor business in this District. I have had 17 years' experience in the sale of the license, and good will, and business of saloon properties. In the course of my experience it has been part of my duty to ascertain or estimate the value of such a business. I know Harten's place of business, but I don't know the amount of his daily or weekly or average receipts of that business. If I knew what his weekly gross receipts amounted to, I would be able to form an opinion as to the value of the business, including also the license, goodwill and fixtures. If the gross receipts there average about $150 a week, I suppose there would be $75 profit. On that basis I can get $8,000 for Harten's business, including the license, goodwill and fixtures.

Upon cross-examination the witness, Hood, further testified as follows:

If the receipts at Harten's place were $50 a day, in my opinion the business would bring on the market $12,000; if the income averaged $75 a day, it would bring $14,000 or $15,000. I am speaking of the business, and not the real estate.

And next, the defendant, further to maintain the issues on his part joined, gave in evidence the testimony of ROBERT L. MONTAGUE as follows:

I have already testified in this case for the plaintiff and stated my connection with the business of selling saloon properties.

Q. "Suppose the receipts from Harten's business amounted to $150 to $200 a week; that the real estate was worth in the neighborhood of $4,000, with the improvements—the land, the buildings on it, the entire tract as described in the testimony here; what would be a fair price to pay for that land, with the buildings on it, and the improvements and fixtures, and the liquor license and goodwill of the business, but not including any of the stock in trade?"

To which question the plaintiff, by his attorney, then and there objected, and the Court sustained the said objection, and refused to permit the witness to answer the question; to which ruling of the Court the defendant, by his attorney, then and there duly excepted, and the exception was by the Justice then noted in his minutes.

And next, the defendant, further to maintain the issues on his part joined, gave in evidence the testimony of SALVADORE RICHARD, as follows:

As stated in my previous testimony I am engaged in the wholesale liquor business here in this city, and have had experience in the

buying and selling of barroom licenses and goodwill of the
33 business, and have been required to estimate or appraise and have estimated and appraised the valuation of such businesses. I am familiar with Harten's place of business. While engaged in the wholesale liquor business during 16 or 17 years, I have made quite a number of sales, and have been frequently connected with the sales of bar-room businesses. In many instances we loan money on sales. In making such loans we must take into consideration the value of the place. The fair cash value or market value of Harten's barroom license, the goodwill of the business, and the fixtures, in April and May last, without including any of the stock in trade, and without considering the value of the real estate or the use of it, and assuming that the receipts of the business are about $150 per week on an average, I should say would be $4,000 to $6,000. In fixing my estimates of such values I take into consideration first of all the receipts, and then the physical condition of the place, the fixtures, the value of them, if they are of any value—and in this case they are not of any cash value—the character of the business itself—that is, whether he sells a good grade of goods at a high profit, or a low grade of goods at a low profit—that being the case—and in Mr. Harten's case I am familiar with his business, and his business is conducted on a rather cheap scale—and the expenses attached to the doing of the business, which, of course, would come out of the profits, and where the business is regulated by the amount of profits that could be made at the end of the year. That constitutes a saloon proposition. Naturally, the rent and receipts are a great consideration; but in this case, a man owning his property, he would have to have a lease. That would enhance the value.

Upon cross-examination the witness, Richard, further testified as follows:

If Harten's daily receipts averaged $50 I judge his business would be worth from $5,500 to $7,000. There is a maximum value to all saloon properties. A business under the most favorable conditions—excellent fixtures and doing a splendid business—would never be worth more than $8,000 or $9,000 under the most favorable conditions. If the receipts were $75 a day, I should say the value of the business would be between $7,000 and $9,000. Harten's business is done with hardly any expense.

Upon re-direct examination the witness Richard further testified as follows:

I wouldn't say that a business bringing in $50 a day could be carried on with hardly any expense. No man could hardly take care of that much business himself; he would need at least one bartender to help him. In reference to what I said as to fixing the maximum price for a business of this kind, the temporary nature of the barroom license was taken into consideration; that is, not only the temporary condition of the business, but the location itself, the desirability and class of trade, and all those matters that enter into the value of the place.

34 And next, the defendant, further to maintain the issues on his part joined, gave in evidence the testimony of THOMAS McCULLOUGH, as follows:

This (introducing a paper) is the contract between myself and Ernst Loffler under which I purchased his saloon business in Georgetown last spring.

The defendant's attorney then offered and read in evidence the said contract, which is in words and figures as follows:—

APRIL 27, 1905.

In consideration of the sum of $5000 to be paid on the transfer of lease and license for the conduct of the saloon business, No. 1332 32nd St., I hereby agree to sell the said saloon business, good will, lease, and license and stock now on the ground floor of said building to Thomas McCullough, possession to be given on the transfer of license to said McCullough, this agreement not to be enforced unless I can secure the business at present conducted by Hugh Harten in Brightwood, D. C. Receipt is hereby acknowledged of check for $250 to bind the bargain the same to be returned to Richard & Co. in case there is no transfer of lease or license or this deal falls through for any reason not the fault of said McCullough.

(Signed) ERNST LOFFLER.
THOMAS McCULLOUGH.

And next, the defendant, further to maintain the issues on his part joined, gave in evidence the testimony of WILLIAM McGUIRE, as follows:—

I was in the retail liquor business in this District for 39 years, ending three years ago; since then I have been President of the Arlington Brewing Company, at Rosslyn, Virginia. The principal business of that Company is in this District and in Alexandria. I have had a good deal of experience in the buying and selling of barrooms licenses in this District. I have been called upon make loans on barroom businesses for the Brewery since I have been there, and before that I did it for myself; purchased for myself. I would think my opinion very good as to the value of such a license. I know the defendant's place of business well. I remember it back over 30 years. I remember when George Woods had it; he added the north part on the buildings; the old part, the south part, is where the bar is. It has never been anywhere else that I know of. I have been out at his place frequently; the character of his business was very meagre. With my knowledge as to the character and amount of the business done there, the nature and character of the goods he was selling, and if the receipts were $75 a day, and $125 on Saturdays, he would have to have two bar tenders and himself to take in that much. I would consider the market value, or fair cash value, of Harten's barroom license, with the goodwill of the business, and the fixtures, and without any of the stock in trade, assuming the receipts to be about $150 a week, without considering the real estate at all, to be about $4,000; I would not consider it to be worth more than $4,000.

35 Upon cross-examination the witness, McGuire, further testified, as follows:—

Mr. Harten is a customer of our brewery, and I am a personal friend of his. If Harten was taking in $60 a day, the license, goodwill and fixtures, without any stock in trade, would be worth $7,000 or a little over—probably over; it depends on the man. It would be worth about $7,000. If he were taking in $75 a day on an average, it would be worth $12,000 or $15,000 easy. In a place like that it would be impossible for a man to take in $75 a day.

And next, the defendant, further to maintain the issues on his part joined, gave in evidence the testimony of DORSEY DONALDSON, as follows:

I live at Brightwood. I know Mr. Hugh Harten and his place of Business on Brightwood avenue. (Witness identifies the picture offered in evidence by plaintiff.) I held the tape for him to measure off 60 feet of the front of his property from the south-east corner. The 60 ft. ended at the hall door. I stood at the south-end and could not say exactly whether the 60 ft. took in the whole of the hall door or not. Nat. Brian and Mr. Harten were present; no one else. That was in April. I do not know of my own knowledge for what purpose the measurement was made.

And next the defendant further to maintain the issues on his part joined gave in evidence the testimony of NATHANIEL BRIAN, (colored) as follows:

I have been working for Mr. Harten off and on for 6 or 7 years. The last time I quit working for him was about a month ago. I had then been working continuously for him about 6 months. I was working for him in April and May last. I know about Mr. Ernst Loffler going out there to see Mr. Harten about buying his place in April.

Q. "Do you know whether Mr. Harten was negotiating with any other person, Mr. Brady particularly, a few weeks before selling his place?"

To which question the plaintiff by his attorney then and there objected. Whereupon the defendant by his attorney offered to prove by this witness that when the contract between the plaintiff and the defendant was signed the defendant had under consideration another offer from another person for the purchase of the business, fixtures, good will and license and business portion of the real estate reserving to the defendant the northern portion of the real estate but the court refused to admit the testimony so offered and sustained the objection to said question; to which ruling of the Court the defendant by his attorney then and there duly excepted and the said exception was then and there by the said Justice noted in his minutes.

(Witness continuing:) I was at Mr. Harten's place along about the last of April when Ernst Loffler, Mr. Richard and Andy Loffler came out there to see about buying the place from Mr. Har-
36 ten. They went through the hall door into the sitting room, adjoining the bar room. I was in the bar room. The door

between was open. Mr. Harten told me not to leave it until after they had gone. While they were in the sitting room Mr. Harten came into the bar room and looked up at the wall where the license was and then went back to the sitting room. He did not take the license off the wall. The gentlemen I have mentioned were in the sitting room about an hour. Mr. Harten carried the drinks in there to them. When they left they went out through the drive way and over to the Villa Flora Club. Mr. Harten was in the bar at that time. They did not come through the bar or say goodbye to him. They did not come back any more that day. That evening Dorsey Donaldson and Mr. Harten with a tape line measured off 60 ft. of the front of the property from the southeast corner. They measured along on the sidewalk in front. The 60 ft. ended about the north side of the hall door. This was before dark about an hour or so after Mr. Richard, Ernst Loffler and Andy Loffler left the premises.

Q. "State whether or not Mr. Harten just after proceeding to make this measurement told you the purpose for which he was making it and if so what he told you."

To which question the plaintiff by his attorney then and there objected and the Court sustained the said objection; to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was then noted by the said Justice upon his minutes.

(Witness continuing:) Previously on that day I saw Mrs. Loffler and Mr. Harten going around the place. He went upstairs with her. That is the only time I ever saw them going anywhere in the house or on the premises at all.

Upon cross examination the witness Brian testified as follows:

My work there was cleaning up, serving oysters, attending the cows and horses, washing bottles and general work. The day the measurement was made was the third time Mrs. Loffler had been out there. The line was put on a nail on a peg right at the end of the fence and Dorsey measured it about 60 feet; he brought the line up to the door; I mean Dorsey Donaldson. I never spoke about this measurement until today; I never gave it a thought.

And next the defendant further to maintain the issues on his part joined gave in evidence the testimony of JULIA HARTEN as follows:

I am the wife of the defendant Hugh Harton. I have been living on Brightwood Avenue where we are now about 9 years this May coming. That is my signature (referring to the contract of April 27, 1905). Mr. Harten signed it before I did. The memorandum under our signatures was not there at the time I signed. I was in the kitchen and Mr. Richard came in and requested me to come into the sitting room. I went upstairs and fixed up a bit and came in the sitting room. Mr. Richard, Ernst Loffler and Andrew Loffler were in there. My husband was not in there. Up to that time I had not seen my husband since Mr. Richard asked me in. Mr.
37 Richard had this paper (referring to the contract) before him and he said "put your name under your husband's" and I did

so. They all gave me a quarter for the church and I retired from the room and I heard them say they were going over to the club house across the road. I went into the kitchen to finish my work. Up to that time Mr. Harten had not spoken to me and I had not spoken to him about this matter. I did not hear anything said at that time about how much Mr. Harten was selling under that contract. I heard nothing said about the stock in trade. They read the contract to me. That is the way I knew what was included in it. Mrs. Loffler came out to look at the place. I think it was after I signed the contract. I am a little uncertain whether it was before or after I signed. She did not have any talk with me nor did I say anything to her about the purchase of the property. When I first saw her I was behind the bar waiting on people in the bar. She came right in behind the bar where I was. My husband introduced me. He said this is Mrs. Loffler. When she was going away she said "are you sorry for giving up the business." I said "No. I need a rest." That is all that passed between us. I never told Mrs. Loffler that my friends and neighbors advised me to get out of the business and that my husband was not capable of running the business. Andrew Loffler and Mr. Ray came out there and asked me would I sign the deed and I said "No." They did not show me the deed. They did not say anything about having any money with them. I cannot remember how long this was after I signed the contract. Mr. Harten kept his accounts in a small book. That (referring to the record of receipts) is the book. I first saw that book about three years ago. I have attended to the bar for Mr. Harten off and on. Sometimes I would keep an account of the amount he was taking in. There was only the two of us. Along in April and May last he was taking in from $140. to $150. a week. The plaintiff's testimony that when I came into the sitting room to sign the contract, Mr. Harten told me he had sold the property and wanted me to sign, is not true. Mr. Harten was not in the sitting room at any time while I was in that room on that occasion. The day Ernst Loffler brought his wife out he asked me about the amount of the receipts of Mr. Harten's business; how much we were taking in; and I said on an average, one day with another during the year $20 to $25. and $30 and $35. some Saturdays—from $20. to $25. I cannot say whether this was after or before I signed the contract. That was the first time I met Mrs. Loffler when Mr. Harten introduced her to me, but Mr. Harten was not present when the plaintiff asked me about the receipts. When I told the plaintiff the amount of the receipts he made no response. He made no comment and said nothing about the receipts after that.

Upon cross examination the witness Mrs. Harten testified as follows:

The way I knew that my husband had sold his place to Mr. Loffler was that I heard Mr. Harten say he had sold the place. I think it was a day or two before I signed the agreement. When I
38 signed the agreement I knew that Mr. Harten had agreed to sell the store part to Mr. Loffler. The first I knew that Mr. Harten had signed the agreement was when I went in the room that

day and saw his name at the bottom of it. I did not know I would be needed to sign until Mr. Richard told me. The only reason I signed the paper was because I saw my husband's name to it and Mr. Richard said there was my husband's name at the bottom of it. After signing I returned into the kitchen and the next time I saw my husband was in the bar about one half an hour later. Afterward Mr. Loffler and another gentleman came out there and asked me would I sign the deed and I said no. They did not show me the deed. After that my husband told me they had asked him to sign the deed and that he would not sign. I don't know anything about Mr. Harten showing Mrs. Loffler the house. I did not go to Mr. Orme and ask him to sign the application for the liquor license. Neither my husband nor anyone else asked me to do so.

Upon redirect examination the witness Mrs. Harten further testified as follows:

Up to the time my husband was trying to sell the business part of the house I knew about the amount of the receipts. Since then I don't know.

Q. "At the time the contract was signed and previously state whether or not there was any understanding between you and your husband as to the reservation of the northern portion of those premises."

To which question the plaintiff by his attorney then and there objected upon the ground that the same was immaterial and the Court sustained the objection and refused to permit the witness to answer the question, to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was by the Justice then noted in his minutes.

Q. "State whether or not from the time of signing the contract to the time when Mr. Ray came out there with the deed to be signed you ever told Mr. Harten you would not sign the deed."

To which question the plaintiff by his attorney then and there objected and the Court sustained the objection and refused to permit the witness to answer the question to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was by said Justice duly noted in his minutes.

And next the defendant HUGH HARTEN further to maintain the issues on his part joined testified as follows:

This is my bar room license for 1905 under which I was doing business at the time of the contract with the plaintiff in April last.

The defendant by his attorney then offered and read in evidence the said license as follows:

No. 241. The Excise Board of the District of Columbia, hereby grants a license to Hugh Harten as proprietor of a bar room located on a location on Brightwood Avenue near Battle Ground Cemetery, from the first day of November, 1904, to November
39 1st, 1905, in accordance with an act of Congress approved March 3, 1893, entitled, an act regulating the sale of intoxi-

cating liquors in the District of Columbia, and as amended May 11, 1902, August 18, 1902, and July 1, 1903.

In Testimony Whereof I have hereunto set my hand and seal this 24th. day of January, 1905.

H. H. DARNEILLE,
Assessor, D. C.

Amount paid $800.

(Witness continuing:) When I applied and paid for that license I was doing business on the south side of the premises. It has been a bar room I suppose for the last 40 or 50 years. I have been connected with the bar room business and connected with it as bartender for 40 odd years; as proprietor about 18 years; at my present place of business about 7 or 8 years. The class of people that patronize the place are merchanics and laboring men. They call for cheap goods; 5 and 10 cent gins and whiskies, also beer. For the whiskies I pay from $1.20 to $3.50 a gallon. The most of what I sell is the cheap whisky. Out of every dollar I take in from the sale of the cheap whisky after taking out all expenses I would have left not more than from 25 to 30 cents. My profit on the higher grade whisky may be 30 cents out of every dollar I take in. Along in April and May last my receipts averaged from $18. to $25 or $30 on Saturdays or thereabouts. They are now $3. or $4. a day less. On an average from year's end to year's end I would not take in any more than $150. or probably less a week. There are some days better than Saturdays. In bad weather there is very little to do. There is no body out there. In a kind of a way I have kept a record of the daily receipts of that business; not continuously. This (referring to the book containing record of receipts referred to by witness Julia Harten) is what we call the daily receipt book. That is the book that I referred to. I never told the plaintiff Ernst Loffler that my receipts were $75. a day and $125. on Saturdays. I never told him anything to that effect. He never asked me what my receipts were. I never told him anything about the amount of my receipts. My annual expense includes $800 for the bar room license; $25. revenue license and $12. cigar license. I did not include expenses for repairing my place and keeping it in order nor taxes or insurance. I heard the testimony of the witness Hood in this case. The conversation he had with me and to which he refers was on the evening my license was granted. The license is dated January 24, 1905. I went into a saloon on La. Ave. and met Mr. Hood there. They were congratulating me upon getting my license. Someone said "Harten I would sell out my license and not bother with it." I said, "I guess I will." Then Hood spoke up and said "I will get a buyer for your place." I believe that was it word for word. I said I would sell my saloon for $12000 without the stock. That is all that passed between me and him. I never had any other talk with Hood about it after that.

He never reported to me that he had a customer. He never
40 communicated to me that Mr. Loffler wanted to buy it. I never heard anything about it until Andy Loffler called out, and he wanted to know, was I going to sell my saloon and I said I

will sell it. He said "what are you asking for it" and I said "$12000." I showed Ernst Loffler around the property on one occasion a few days after the contract was signed. (Referring to the contract in evidence dated April 27, 1905). I never saw that contract since I signed it until I saw it here in Court during this trial. They would not give me a copy of it even. The memorandum at the bottom of the contract was not there when I signed. Salvador Richard wrote the contract at the request of Ernst Loffler; not mine. While he was writing it he made a remark about the description of the property and there were several suggestions about the measurement. While they were talking about it I waited on a customer in the bar room and when I returned to the sitting room Mr. Richard asked me "how much," I said "about 60 ft." I understood that he referred to the business part; the saloon."

Q. "If Mr. Loffler at that time understood that he was making the contract for the purchase of all the land was anything said there to indicate that that was his intention?"

To which question the plaintiff by his attorney then and there objected and the Court sustained the objection and refused to permit the witness to answer the question; to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was then noted by said Justice upon his minutes.

(Witness continuing:) The said 60 ft. takes up to the hall door and will include the hall way. That is correct to an inch or so. It is not over a foot difference either way. I got a tape and measured it off and after measuring it off I said "The hall goes in with the business part and that will leave me the store room clear." I made the measurement two or three hours after Richard and Loffler left on the day the contract was signed before sun down. Nat. Brian, the colored man, and Mr. Donaldson who held the tape were present when I made that measurement. The front room at the north side of the building is the storeroom where I keep my stock in trade in bulk. The room over that was called the ball room. It was idle at that time. When Richard was writing the contract he asked me to give the dimensions of what was on the license or how was the property described. The license was in the bar room nailed up on the wall in order that it could not be removed. I looked at it and took the dimensions and told him what the dimensions on the license were. When I applied for the license the bar-room was then situated where it is at present, on the south side. To my knowledge no other room on that property was ever used as a bar room. While Mr. Richard and his party were there that day I had no conversation with Mrs. Harten about the contract or the sale of the property. She was not in the sitting room when I signed the contract nor was I in the sitting room when she signed it.

Q. "State whether or not, if you know, the south 60 ft.
41 that was measured off there carried back to a depth of 200 ft. would be sufficient to carry on that bar room business?"

To which question the plaintiff by his attorney then and there objected and the Court sustained said objection and refused to per-

mit the witness to answer the question, to which ruling of the Court the defendant by his attorney then and there excepted and the exception was then noted by said Justice upon his minutes.

(Witness continuing:) I saw Mrs. Loffler out there twice. The first time was from 3 to 5 days or about that before the contract was signed. The next time was the second day after the contract was signed. I have never seen her there since that. I did not show her around the place on her first visit and I do not think she went around the place then. On the second occasion I showed her around the place.

We went up the back stairs up to the ball room; I use it now for a pool room. She made a lot of suggestions about this and that, and what she was going to do and what she would not do and all that kind of business. And I told her I was in a hurry and wanted to go down stairs, we then went around and came down another steps. There are two stairways in the building, one in the new and one in the old building. She wanted to go in one bed room but I told her I did not think Mrs. Harten had fixed it up and probably she would not like to have her go in there. Then we came down the back steps and went into the dinning room. It was merely a friendly expedition. I continued until I went half way down into the yard with her. She suggested that she would like to see the place and I just accompanied her to show her around. I never told her on her husband that I was selling the whole of the property. When Andrew Loffler came out there and asked me to sign the application for the transfer and to sign the license he had not obtained all the necessary signers. James Orme who was a necessary signer had not signed the paper. He is dead now. He was a next door neighbor of mine. I believe Mr. Andrew Loffler made efforts to get Mr. Orme to sign. Neither Ernst Loffler nor anyone representing him asked me to get Orme to sign. When I was asked to sign my name on the back of the license and to sign the application for transfer to Ernest Loffler I replied I would sign no paper until I could get a copy of the original or see the original agreement which was denied me from first to last. They would not show me the original. That was the reason I gave for refusing to sign any more papers. When I signed the contract they were in a jolly kind of a mood and adjourned over to the Villa Flora Clubhouse and forgot to give me a copy of the agreement. I had been called into the bar to wait on some customer and when I came back they were all gone. That is the way I did not get a copy of the agreement and that was my reason from first to last for not signing any papers until I could get a copy of the original agreement or see the original agreement which was denied me all through and that is where the controversy came in. When Mr. Loffler asked me to sign the application I asked him if he
42 got all the signers and he said "No," he lacked one signer and that was Mr. Orme. He mentioned Mr. Orme. I said "Is there no possibility of getting him," and he said "I don't think so." When they showed me the deed to be signed I just read two or three lines of the heading and handed it back to Mr. Ray. I did not read it through. Mr. Ray said he had the purchase money with

him and that he was ready and willing to pay me the whole of the purchase price right there and then. When I asked him if he had the original agreement with him he gave me a typewritten copy or something and I said I want to see the original agreement and I won't sign any papers until I see the original agreement. That is what I said. The Villa Flora Clubhouse is about 40 yards from my place. Ernst Loffler never told me that he would have to dispose of his saloon in Georgetown before he could buy my place. After I signed the contract there was a knock on the counter and I went in to wait on some customer and when I came back they were all gone. They went out through the hall door. On the north of the south 60 ft. by 200 ft. of that tract I have the store room and adjoining the northern line of the tract there is a lane way about 16 and 17 ft. wide. As soon as there is 13th or 14th or 16th St. running out in that direction that lane falls into my property. The residue of that property after cutting off the south 60 ft. by about 200 ft. would be of practical value to me. When I signed that contract I expected and understood I was selling and would have to convey the saloon and the business part. I did not tell Andrew Loffler that for $12,000 I would sell everything excepting the pool tables and stock. He asked me if I was selling my saloon and I said "yes," I was about to sell it. He said "What will you take for it." I said, "$12,000, without stock." I said, "Who is your client." He said, "It is no matter." I said, "If it is Ernst Loffler I will not sell to him." "I have a reason for saying so." He replied, "I will buy it myself." I said "If you will buy it, I will sell to you." That is all the conversation. I don't know what he communicated to Ernst Loffler. That is the conversation we had at first. When the plaintiff and Mr. Ray came out to get me to sign the license I did not tell them that I did not want to sign on account of my wife or that my wife objected or refused, or anything about family troubles. We never had any trouble. I did not offer Andy Loffler $100 to get me out of it. He said "I don't think Ernst Loffler is going to pay me enough commission. Would you give me a little if the deal goes through." I said "I have nothing to do with it. You are buying it. I am selling. If there is any commission given it is given to me." And the subject ended there. We had a drink and he went about his business. In reference to the testimony of Peter J. May, it is not true that I said I had sold everything I had or the whole place nor did I tell Mrs. Ernst Loffler that I had sold everything. I paid $6000 for that place, including real estate and the old building and the new building but no stock. I told the plaintiff's agent, Andrew Loffler four or five different times that the plaintiff could have the south 60 ft. front by the 200 ft. He wanted me to sign the paper. I said he can have it if he draws the deed according
43 to the contract. He declined to draw the deed according to the contract and I refused to sign the paper. The first time I told Andrew Loffler that was 2 or 3 days after a little controversy when I would not sign the paper. I told him he could have it at the original agreement and said I would like to see it, but that agreement was never shown to me and I could not get at it. Andrew Lof-

fler was not my agent and did not represent me in this transaction at all. He claimed to represent Ernst Loffler.

Q. "State whether or not at the time you signed this contract other negotiations were pending between you and any other party or parties for the sale for $12,000 of the south 60 ft. of the real estate and the business, license, fixtures without any stock in trade, being exactly what you contend you had sold here to Loffler?"

To which question the plaintiff by his attorney then and there objected and the Court sustained the objection and refused to permit the witness to answer the question; to which ruling of the Court the defendant by his attorney then and there excepted and the exception was by said Justice then noted in his minutes.

Upon cross examination the witness Harten further testified as follows:

My reason for not wanting to sell to Ernst Loffler was because he made some mean remarks to some parties down town about something that occurred which was not a fact. When Andrew Loffler came out with Mrs. Ernst Loffler I withdrew my objection and said let it go. I did not want to make any objection to her husband on account of the lady being there on a little matter which occurred previous to that. When I took Ernst Loffler and his wife over the house a few days after the contract was drawn and signed I did not take Andrew Loffler but I believe he followed the party. I was showing them the house only in a friendly way. Ernst Loffler knew more about the buildings and surroundings than I did. The occasion when Mrs. Loffler was there was the only time I went upstairs with them to show them anything. The hall way is between the sitting room and the store room. The store room has two windows and a door in the middle. I am sure I never took Ernst Loffler and Andy Loffler around the place before the contract was signed. I did not see Mrs. Loffler there on the day when the contract was signed. She was not out there that day. When I took them around was two or three days after the contract was signed. The day I signed the contract Salvador Richard came into the bar and said "the two Lofflers are inside and I want you to come in." So I went into the sitting room where they were. He said, we are going to draw up this agreement and will you sign it. A week or 10 days previous to that I had an undertaking with Andrew Loffler that the place was to be sold, the bar room, the saloon, for $12,000. I had an understanding that the property was to be sold for $12,000 to Ernst Loffler. When the agreement was drawn up I read it over and said, "Well, I guess that will suit" and then signed it. There was no mention about selling
the place or the property or the real estate. The agreement
44 between me and Andy Loffler was that when the agreement
was drawn up if it satisfied me then I would either sign or not sign. When it was drawn up I read it and said "I guess that will suit" and then I signed it. Then I turned around and told the colored man to go and step it off. He stepped it off and afterwards I measured it off because I was not satisfied with the measurement that that was 60 ft. taking the hall door in. There was no mention

at all about the real estate between me and Andy Loffler. All that was ever mentioned was that he was buying the saloon on the south.

Richard says we are going to draw up this agreement and it is up to you to sign it or not; so he wrote up the *the* agreement and I read it over and I figured it in my own mind how far the 60 feet would go. Well, says I, that will leave me the store room; I only said this to myself; I did not tell anybody else that the 60 feet only covered a portion of the property.

Q. Did Richard ask you what was the front of your property.

A. There was a sort of discussion between the whole crowd of them, what would cover 60 feet or something——

Mr. Richard did not ask me what the front of the property was. He did not ask me because he ought to know it. They were not talking about or estimating what the front of the property was. There was a discussion about 60 ft. and after they decided among them about 60 ft. said "I guess that will be about right." I was talking about the saloon how far 60 ft. would cover from the south. The whole house was not used for saloon purposes. I did not know I was selling the whole property. I agreed to sell 60 ft. by 200 ft.

Q. Did you have that much to sell?

A. Yes.

Q. How much is 60 by 200 how many square feet.

A. Excuse me I am no grammarian——

Q. Is it not a fact that Richard asked you about what the front of the property was and you said you did not know, and that they began to estimate?

A. I did not.

Q. And didn't you say you thought it was about 60 feet?

A. After they decided among themselves about the 60 feet, I said, I guess that will be about right.

Q. You said you thought that would be about right?

A. Yes.

Q. And they were talking about the front of the property.

A. No, sir.

Q. What were they talking about?

A. I was talking about the saloon; how far sixty feet would cover from the south, how far it would take.

Q. Was not the whole house used for saloon purposes. Was it not part of your saloon business, the store room and sitting room and used as a serving room, and was not the pool room used as a part of your saloon business?

A. No, it was not; the whole house was not used.

Q. Was it not used in connection with the business?

A. Of course, in this way, it was used; in fact, the saloon, when it is licensed, the whole of the premises is licensed.

I did not know whether I had 12,000 feet out there to sell.

45 I did not tell Mr. Loffler or anybody else when we were talking about the description, that I would have to run a wall through his property, nor did I tell them that 60 feet front would cut through the hall way to the northern portion of the house, nor did I tell them where the 60 feet would end; I did not know how

many feet wide my house is, nor did I measure it. I think the driveway on the south side is about 16 feet; I did not tell them I was going to cut the store room off. I did not tell them anything about my intention, and when I was talking to Andrew Loffler about selling the place, for $12,000 he did not ask me if I was going to cut off a portion of the place; Andrew Loffler asked me what I would take for my place and I told him I would take $12,000 for it, he asked me what I would sell the saloon for. I did not tell Andrew or Ernst Loffler at any time that I was negotiating with them I did not intend to convey the whole of that property; I did not think it was necessary to do so. The bath room in the house is over the new building; it is not in this 60 feet. When they asked me what the front of my property was I did not know what property they were talking about (382).

Q. But whatever they were talking about you told them it was -bout sixty feet?

A. No, I did not tell them, they got up that themselves and wrote it down. I believe I assented to it when I read the agreement. When Richard wrote it down (382) he handed it to me and I read it over and I said I guess that is about right, about 60 feet. That is the time he made the remark and Richard made the mistake in this way, but I never mentioned anything about the 60 feet until the agreement was handed to me and I read it over, and I believe Richard made the remark, he said, is not that about right, 60 feet, and I said I guess so. That would square off the two sitting rooms and the saloon and go so far down the yard and then cut off. That would leave the store room to me. That was my intention all through. I did not know Andrew Loffler was talking to me about the whole place. He asked me what I would sell the saloon for. The saloon without the stock was all that was mentioned between me and Andy Loffler. I did not tell him that I did not intend to convey the whole of that property because it was not necessary to do so. I never mentioned anything about 60 ft. until the agreement was handed to me and I read it over. Mr. Richard made the remark then, "Is that not about right; that 60 ft." and I said "I guess so." Before Mr. Richard write down the 60 feet they were asking themselves questions. I don't know what they were asking because I had no bar tender at the time and I [illegible] in and out of the bar room waiting on customers and I really could not tell what did occur in the sitting room where they were discussing about the agreement or what they were talking about. I did not hear half of the talk. Mr. Richard asked me what was the number of the square and I said I could not tell. At that time there was a rap came at the counter and I went into the bar room and when I came out the agreement was wrote up. It was handed to me and I read it over. Richard said

Mr. Harten do you think that is right and I said yes I think
46 that the 60 ft. is right. After that Mr. Richard went out
and got my wife to come in to sign it. I did not see my wife or any of them after that. I went in the bar room and was busy. I knew what was in the agreement. I wanted to get a copy of it to make myself sure. The only reason I refused to sign the applica-

tion for the transfer of license was because they would not give me a copy of the contract or produce the original. I asked Andrew Loffler to produce the original the next day after signing. He came up to get the signers and I said I wanted a copy of the agreement, that they forgot to leave a copy of it with me. He said I will get a copy of it for you. From that time until they asked me to sign the application I asked him several times for a copy. When I refused to sign the application I told them my reason for not signing was because they had not given me a copy of the contract or produced the original. That is the only reason I had. That book (referring to the record of receipts) is in my handwriting. I made those entries a way back in 1902 and 1901 and so forth. The book does not show the sales for 1905 except for a portion of November. I did not keep a record of the rest of my sales for that year because it was not necessary. There was nobody there except my wife but when the Excise Board objected to her being behind the bar then I began to keep a little more strict account when other people were handling my money. I wrote out a check for $250., the check which Mr. Bailey has there now and sent it to Mr. Loffler in order not to keep any of his money. I did that because I thought the deal was over because neither of us were agreeing about the sale. When I refused to sign the deed I did not know how much property was described in it. If he had brought the original agreement to me then and there, then I would have read over the deed to see if it was in correspondence with the contract. I did not know whether the deed agreed or disagreed with the contract.

Q. "In 1905 what did you consider all the real estate and the business as it stood there worth, license and all?"

To which question the defendant by his attorney then and there objected upon the ground that the witness has not been shown to be an expert or qualified to form an opinion as to the value of property but the Court overruled the objection and required the witness to answer the question; to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was noted by the Justice in his minutes.

A. If I was selling the whole property I would take not less than $16000 for it. I don't know what it would be worth on the market. If I was selling the entire front of it, the whole business I would not take less than $16000. It might not be worth more to other persons but I would not take less than that.

Q. "Is it worth that much to you?"

A. In years to come it might.

Q. "You said it was worth that on the 27th of April last."

A. The reason I would not take less than that is the expectations of better times.

47 (Witness continuing:) The profit on my business was about 20 or 25 per cent. One week with another a good average of the receipts would be about $150 or $155. Twenty-five per cent. of the receipts would be a fair average of the profits. I really cannot say how much my profits were a week. I don't believe

they were $30 or $25. They might be $20 a week. I owe more now than when I went into the business.

Q. "How is it you fix the value of the property and the business at $16000.?"

A. The expectations of better times.

Upon redirect examination the witness Harten testified as follows: Each entry in that book, the record of receipts, was made by me on the same day of the date. I never counted the pennies, which I left in the till to go in the next day's receipts. The entries show even Dollars, the amount which I took out of the cash register. I made the entries each day at the conclusion of it.

The defendant by his attorney then offered and read in evidence to the jury the entries in the said book of receipts showing weekly receipts and omitting entries for incomplete weeks or parts of weeks, as follows:

1902, Aug	.....	$141.50
Sept	.....	195.00
		151.00
		135.00
		124.00
Oct	.....	153.00
		130.00
Dec	.....	144.00
		129.00
		135.00
		168.00
1903, Jan'y	.....	108.00
		94.00
		84.00
		100.00
		92.26
Feb'y	.....	102.00
		128.50
		106.00
		91.00
March	.....	127.00
		136.00
		117.00
		122.00
April	.....	130.00
		123.00
		150.00
		113.00
		144.00
48 May	.....	146.00
		143.00
		170.00
		205.00
June	.....	190.00
		215.00
		221.00

Nov.	215.00
	223.00
	176.00
	181.00
Dec.	152.00
1904, June	146.00
	176.00
July	187.00
	188.00
	189.00
1905, November	179.00
Total for 47 weeks	$6,975.26

(Witness continuing:) The reason I did not keep the book regularly was that there was nobody handling my money except my wife and myself. In stating the whole thing to be worth $16000. I did not include the stock in trade. When I returned the $250 by my check to Mr. Ray as attorney for Mr. Loffler I had been informed by Mr. Andrew Loffler as to the description of the property mentioned in the deed. When I was asked in regard to the frontage and I said about 60 feet, I understood the inquiry was as to the frontage of the saloon property. I understood it would take about the hall door in. The hall is in the new part of the building. That would leave the store room to me. I understood that the hall went with the old part. There is a stair way to get upstairs from the new building. I knew when I signed that the 60 ft. would go very close to taking in all the hall. If the front door of the hall was nailed up and belonged to another man and I had the north or new part of the building including the store room I could get upstairs through the store room. You can go from the store room upstairs without going out in the hall at all.

And next the defendant further to maintain the issues on his part joined gave in evidence the testimony of PRESTON B. RAY as follows:

I am a member of the bar of this Court and have been acting as attorney for the plaintiff Loffler in this transaction. I have heard the testimony in this case. The day before we went up to get Harten to sign the application I was employed as attorney for the plaintiff Loffler. After that Mr. Bailey attorney for the defendant came to my office and asked to see the original contract between these parties and I showed it to him, and gave him a copy of it.

49 He asked to see the deed which Harten had refused to sign and I showed it to him. After that I had a conversation with Mr. Bailey at his office. He said he had looked into the matter and considered the contract to be too indefinite to be enforced by a suit for specific performance or by an action for damages. He based his opinion upon the fact that the contract called for 60 ft. by 200 ft. and the deed called for 85 ft. by a different depth. I told him I thought it was a mere quibble that he could not stand on. He said

he would advise his client, Mr. Harten, to fight it or something of that kind. Mr. Bailey informed me at that time that Harten was willing to convey what the contract called for; 60 ft. by 200. I said I thought he was wrong; that it was a mere attempt to back water, trying to get out of the contract.

Upon cross examination the witness Ray testified further as follows:

When Mr. Bailey called on me it was the first time I had been requested to furnish a copy of the contract to anybody. I never refused to give Harten a copy. I have no recollection of his asking me for it.

And next the defendant further to maintain the issues on his part joined gave in evidence the testimony of ADAM R. BRADY as follows:

The day Mr. Richard and Andrew Loffler and Ernst Loffler were at Mr. Harten's place in the latter part of April I was in one of the rooms. One of them called me into the sitting room where they were. They were talking about buying the property from Mr. Harten. In a few minutes I went over to my house 250 yards back of that place and returned to Harten's place about an hour later.

Q. "What, if anything did Harten then tell you that he was selling to Mr. Loffler." To which question the plaintiff by his attorney then and there objected and the Court sustained the objection and refused to permit the witness to answer the question; to which ruling of the Court the defendant by his attorney then and there duly excepted and the exception was by said Justice then noted in his minutes.

And next the defendant further to maintain the issues on his part joined gave in evidence the testimony of THOMAS HANLON as follows:

I have been working for the defendant Harten for about two months last past.

Q. "State, if you know, the average receipts in that business in that time?"

To which question the plaintiff by his attorney then and there objected and the Court sustained the objection and refused to permit the witness to answer the question; to which ruling of the Court the defendant by his attorney then and there excepted and the exception was then by said Justice noted in his minutes.

And thereupon the defendant rested.

50 And next in rebuttal the plaintiff gave in evidence the testimony of ANDREW LOFFLER as follows:

Mr. Harten did not ask me for a copy of the contract or the original in any of the interviews I had with him when I was asking him to sign the application for the transfer of the license. He showed us around the place, Ernst Loffler and me a couple of weeks before he made the contract. Mr. Harten did not intimate or give

me to understand in any manner that he was not selling the whole of the real estate. The principal subject of discussion was the real estate because I was in the real estate business and the business was to go with it.

Upon cross examination the witness Loffler testified further as follows:

Harten told me he concluded to sell the whole place; every thing except the stock. It was about three weeks before he signed the contract. I told him I could get him a customer. He said all right bring him out. He showed me around the place the next day. I went out every afternoon. I was going out for about three weeks before we got down to terms. When he told me he concluded to sell the whole place, everything except the stock, that was about three weeks before he signed the contract. That was the first conversation. Two weeks later the price was agreed upon. He said he was going to get a place down southwest.

And next the plaintiff in rebuttal gave in evidence the testimony of ANNA LOFFLER as follows:

Before the contract between my husband and Mr. Harten was signed I had passed Harten's place but never was in it. The first time I went in was 1 or 2 days after the paper was signed. Mr. Harten told me to look carefully at what we were getting. I was not out there the day my husband signed the contract. Mr. Harten and Mr. May went upstairs with me.

And next the plaintiff in rebuttal further testified on his own behalf as follows:

When I asked Harten to sign the application for the transfer of license he did not ask me of any of our party for the original contract or a copy. He never gave me as an excuse that he had not the original or a copy.

And thereupon counsel for both parties announced to the Court that they had no further testimony to offer and the foregoing was all the testimony adduced before the jury by either party to said cause.

Thereupon the plaintiff moved the Court to instruct the Jury as hereinafter set forth in the charge to the jury, and therein referred to as the plaintiff's 1st, 2nd, 3rd and 4th prayers, respectively; which motion was granted by the Court over the objection of the defendant by his attorney and subject to the several exceptions thereto, hereinafter set forth.

Thereupon the defendant, by his attorney, moved the Court to instruct the Jury as follows:—

51 I. "You will return a verdict for the defendant."

But the Court overruled said motion, and refused to so instruct the jury; to which ruling of the Court the defendant, by his attorney, then and there duly excepted, and the exception was then noted by the Justice in his minutes.

Thereupon the defendant, by his attorney, further moved the Court to instruct the jury as follows:

II. If you find upon all the evidence that the fair cash value of the property included in the written contract dated April 27, 1905, between the plaintiff and the defendant and mentioned in the testimony, including the defendant's barroom license and the goodwill of the bar room business, conducted by him under said license and so much of the real estate owned by the defendant and upon which he was then conducting said business as was necessary for the convenient operation of said business and having a front of sixty feet more or less on Brightwood avenue with a depth of 200 feet more or less, together with the fixtures thereon used and required for use in and about said business, was less than $12,000 at the time when the plaintiff's attorney returned to the defendant's attorney the check for $250, as shown in the evidence, you will, in your verdict, award damages to the defendant for the difference between the said fair cash value and the sum of $12,000, less said sum of $250; provided such difference, if any, exceeds $250.

III. If you believe, upon all the evidence, that the defendant when he signed the written contract of April 27, 1905, mentioned in the testimony, intended said contract to include therein the license, good will and fixtures of his barroom business, together with a part and not all of his real estate fronting on Brightwood Avenue, and mentioned in the testimony, your verdict will be for the defendant.

VI. If you believe upon all the evidence that the plaintiff Loffler, when the contract of April 27, 1905, was written by Richard, did not know the dimensions of the tract of land owned by the defendant, Harten, fronting on Brightwood Avenue, and mentioned in the testimony, and was satisfied to pay and intended to pay $12,000 for the license, fixtures and goodwill of Harten's barroom business, together with so much of said tract as was necessary for the conduct of said business, amounting to sixty feet front more or less by a depth of 200 feet, more or less, your verdict will be for the defendant.

IX. If you believe upon all of the evidence that the witness Richard wrote the contract of April 27, 1905, at the request and on behalf of the plaintiff, Loffler, and that while he was writing it he asked, "What is the size of this place?" or words to that effect; that thereupon Andrew Loffler suggested 60 feet; that the defendant Harten then and there referred Richard to the description in his liquor license to show the location of the property, and assented to the statement then made by some other person or persons there present as to the dimensions of the property; that nothing was then said to call Harten's attention to the fact, if it was a fact, that the plaintiff, Loffler, was expecting to get the entire tract under the contract, your verdict will be for the defendant Harten.

X. It was the duty of the plaintiff to investigate and ascertain for himself the value of Harten's business; and if you believe
52 upon all the evidence that he was misinformed by Harten, as to the amount of the receipts of the business, but that he did not rely upon what Harten told him as to the said receipts, and that he knew or should have known that the receipts of the business did

not amount to as much as was stated by Harten, and that he was not misled by such statement, you will not consider the said statement as having any bearing upon the question of the value of the business or as affecting the measure of damages.

XI. It was the duty of the plaintiff to investigate for himself as to the dimensions of the entire tract in question, if he thought he was buying the entire tract, and if you believe upon all the evidence that the plaintiff or the witness Richard knew or should have known at the time Harten signed the contract of April 27, 1905, that the front of the entire tract was 85 feet, or much more than 60 feet, and was not "about" 60 feet, your verdict will be for the defendant.

XIV. Your verdict must be the result of your concurrence upon the facts established by the evidence. In reaching such a result it is the duty of each juror to stand by his own individual judgment and understanding and not to surrender to the views of other jurors. In case of apparent inability to concur in a verdict, it is proper that you should express to each other your reasons for your respective opinions based wholly upon the evidence and to endeavor in that way to agree upon a verdict, which shall be in accordance with the weight of the evidence and the instructions given you by the Court.

XV. The intention of the parties to the written contract of April 27, 1905, must prevail. Their intention is to be ascertained if possible, from the words of the written contract itself, according to the meaning of such words, in their ordinary acceptation and everyday use, and every word in the contract is to be considered as a part of the expression of the intention of the parties. Any doubt as to the meaning of the words used in the contract should be determined in favor of the defendant.

To which instructions, and to each of them, the plaintiff, by his attorney, then and there objected, and the Court then sustained said objection and overruled said motion as to each of said instructions II, III, VI, IX, X, XI, XIV, XV, and refused so to instruct the Jury; to which ruling of the Court as to each of said instructions so requested, the defendant, by his attorney, then and there duly excepted and the exception was then noted by the Justice in his minutes.

Thereupon the defendant, by his attorney, further moved the Court to instruct the Jury as hereinafter set forth in those portions of the charge to the Jury therein referred to as the defendant's IV, V, VII, VIII, XII and XIII prayers, respectively, which motion was granted by the Court.

53 And, thereupon, the Court charged the Jury as follows:

GENTLEMEN OF THE JURY: The plaintiff, Ernst Loffler, sues the defendant, Hugh Harten, in this case to recover damages for an alleged breach of a contract relating to real estate, executed on the 27th day of April, 1905.

Now, it is your duty, Gentlemen, to decide this case fairly and impartially between the parties, according to the evidence submitted to you and under the instructions of the Court as to the law applicable thereto.

I want also to say to you that with the consequences of your verdict in this case you have nothing to do. The obligation of your oaths imposes upon you the plain and responsible duty of deciding the issues here joined between the plaintiff and the defendant according to the law and the evidence.

And, therefore, I instruct you in the language of the defendant's XIII prayer, as follows:

"In reaching a verdict it is your duty to consider all the evidence and to exclude from your consideration all facts which are not in evidence, and to return a verdict in accordance with the preponderance of evidence; but in determining the probative force and weight of the testimony of each witness you may consider the interest, if any, shown by the evidence, of each witness in the result of this trial, and the inherent probability or improbability, consistency or inconsistency, reasonableness or unreasonableness of his testimony, and you may use your own personal knowledge derived from your experience in the ordinary affairs of life, to aid you in determining as to the truth and probative force of each statement in the testimony of each witness."

In other words, you are the sole judges of the weight of such testimony, and of the inferences to be drawn therefrom. Your verdict must be based solely upon the evidence as you have heard it from the witness stand, uninfluenced by any considerations of sympathy, bias or prejudice, either for or against either party to this suit, or either for or against anyone connected therewith, whether it be the parties plaintiff or defendant or not.

[This case, as you understand, turns upon the single question of fact, namely, whether the written contract of April 27, 1905, was intended by both parties to it to cover the whole of this real estate, or only a part of it. That is the pivotal point in this case.] [If you are satisfied from the fair preponderance of the evidence that it was to cover the whole of it, then your verdict must be for the plaintiff; otherwise, for the defendant.]

So this is the paramount question for your decision or determination. And in doing so, you may take into consideration not only the written agreement itself (but all the facts and circumstances attending its execution as they have been detailed to you by the witnesses) subject to the instructions of the Court as to the law applicable thereto.

(If you find from the evidence that this written contract was intended by both parties at the time of its execution, to cover the purchase and sale of the whole of the defendant's said real
54 estate, including the good will, license and fixtures, and that the plaintiff was ready, willing and able to perform his part of said contract and offered to do so, and that the defendant then and there refused to perform his part of said contract, then the plaintiff is entitled to your verdict notwithstanding the difference between the true measurements of the boundaries of said real estate and the measurements made in the written contract.) While parol testimony is not admissible in evidence to contradict, vary, add to or subtract from the terms of a valid, written contract or instrument,

such testimony is always admissible to identify the subject matter of a contract, for instance, as in this case, to identify the exact parcel of real estate included and intended to be included in such contract. Otherwise great injustice would result.

Thus, in a deed of a mill and its appurtenances, the appurtenances may be pointed out orally. Or, if one bargained with another to pay him so much for his farm, the farm may be located by parol.

I give you these as a simple and easily comprehended illustration of the rule, and the reasonableness of the rule. On the other hand, if you should find from the evidence that the written contract correctly states the boundaries of the property covered and intended to be covered thereby, and that the defendant was ready, willing and able to perform his part of said contract, and then offered so to do, but that the plaintiff then and there refused to perform his part of said contract, then the defendant is entitled to your verdict, notwithstanding the use of the word "about" in the contract itself in connection with the measurements.

I also instruct you, in the language of the plaintiff's third prayer as follows:

"[If the Jury find from the evidence that as a result of the negotiations and attending circumstances between the plaintiff and the defendant, it was understood and agreed between them that the defendant should sell to the plaintiff and the plaintiff should purchase from the defendant, among other things, the whole of *this* real estate, situate on Brightwood Avenue, near Battle Ground Cemetery, upon which the defendant carried on his business, and that the defendant agreed to sell, and the plaintiff agreed to purchase, the business, fixtures and license for the business, conducted by the defendant, in and upon said premises, as also all of the said real estate for a gross sum; that after the subject-matter of said purchase had been verbally agreed upon between plaintiff and defendant, and their contract was about to be reduced to writing, the defendant through inadvertence, or otherwise, misstated the frontage and depth of the said real estate; and that relying upon such statement or representation, the said real estate was, in said agreement, erroneously"—that means inaccurately—"described as having a frontage of 'about 60 feet' with a depth of about 200 feet, then the Jury are at liberty to reject so much of such description in said agreement, as was so
recited by reason of such inadvertent statement, or other-
55 wise, if, with the aid of parol testimony, admitted in evidence, they are able to determine what property is referred to in the agreement for sale offered in evidence.]"

I also instruct you, in the language of defendant's 12th prayer, as follows:

"The plaintiff, Loffler, cannot recover in this action unless you believe, upon all the evidence, that he understood, at the time Harten signed the contract of April 27, 1905, that Harten intended thereby to sell to him the entire tract of land in question; also that Harten at that time knew such to be the plaintiff's understanding; also that the fair cash value of the entire tract, together with the license, fixtures and goodwill of Harten's business, was in excess of $12,000 at

the time when the plaintiff's attorney returned to Harten's attorney the check for $250, as shown in the evidence. And the burden of proving these facts is upon the plaintiff."

As something has been said to you about fraud in connection with this contract, it is proper that I should say to you that the several counts in the plaintiff's declaration are not founded upon fraud, but upon alleged breach of the written contract by the defendant. [The theory of the plaintiff's action is not that there was a fraud in writing into the contract the frontage and depth of the property as therein stated, but that not knowing the exact measurements it was estimated at about sixty feet front by about 200 feet in depth, as sufficient to cover the whole, and that it was so understood and agreed between the parties at the time they signed it.] While the theory of the defendant, on the other hand, is that the written contract correctly expresses the amount of real estate covered and intended to be covered by said contract.

I also instruct you, in the language of the plaintiff's first prayer, as follows:

"[If the jury believe from the evidence that the object of the parties to this suit was the sale and purchase, among other things, of the defendant's parcel of land, triangular in shape, fronting 85 feet of Brightwood Avenue, and the two other lines thereof having a depth of about 224 feet and 239.50 respectively, described in the evidence herein, and that in the written memorandum of said sale the words 'about 60 feet' relating to the front of said property, and the words 'about 200 feet' relating to the depth thereof, were inserted as estimate only of the frontage and depth, respectively, of said parcel of land, and not to limit the quantity of land sold, or the front or depth lines of said property, then the said contract is to be interpreted as applying to the particular parcel of land in respect to which the parties were dealing.]"

I also instruct you, in the language of the plaintiff's second prayer as follows:

"[If the jury believe from the evidence that the defendant agreed in writing to sell to the plaintiff the good will, license and fixtures of the business carried on by him, located on Brightwood Avenue, near Battle Ground Cemetery, as also the real estate and improvements upon, and in which the said business was carried on, for the gross sum of $12,000; that the plaintiff paid to the said defendant the sum of $250 on account of the purchase money aforesaid; that plaintiff tendered himself ready and willing, and was able, to comply with the terms of said sale, and pay the purchase money aforesaid; and that the defendant refused to transfer and convey to the plaintiff the said good will, license, fixtures and real estate aforesaid, then the plaintiff is entitled to recover, notwithstanding they may find in the written contract for sale the frontage and depth of said real estate was erroneously stated.]"

56

[In other words, gentlemen, if you are satisfied from a fair preponderance of the evidence in this case that at the time the contract of April 27, 1905, was signed by the defendant, Harten, the plaintiff, Loffler, understood he was thereby purchasing, and the defendant understood he was thereby selling the whole of said real

estate, including the fixtures, license and the good will of defendant's business, and that in writing into the agreement the frontage and depth of the real estate it was inaccurately stated as having a frontage of about 60 feet and a depth of about 200 feet, and that those figures were employed as an approximate estimate of the said frontage and depth and as sufficient for the purposes of the contract to cover the whole of the said real estate, then your verdict must be for the plaintiff.] [And in that event the measure of damages, or the amount of damages to which the plaintiff would be entitled would be, first, the excess, if any, of the fair market value of said property at the time of the breach *if* said contract, over the price the plaintiff agreed to pay for it;] secondly, the amount paid by the plaintiff to the defendant on account of said purchase price, which sum, it was agreed by both sides, was $250.

I further instruct you, in the language of the plaintiff's fourth prayer as follows:

"[If the jury should find for the plaintiff, then, in assessing the damages which they may find the plaintiff is entitled to recover, they may take into consideration, as they shall find them from the evidence, the difference in the market value of the property agreed to be sold by the defendant to the plaintiff and the purchase price agreed to be paid by plaintiff,] and the amount paid by plaintiff to the defendant on account of the said purchase price."

The burden of proof is upon the plaintiff to establish by the weight of the evidence the averments of this declaration in order to entitle him to a verdict against the defendant.

[If, as I have stated, you believe from the evidence that the defendant is guilty of a breach of the contract of April 27, 1905, the plaintiff would, in that event, and without showing any special injury, be entitled to nominal damages for such breach, upon the theory of the law that every breach of contract presupposes damages. But, in order to entitle the plaintiff to recover more than nominal damages, he must satisfy you, by the weight of evidence, that he has suffered a pecuniary loss on account of such breach of the contract by the defendant.]

Therefore it is that I have stated to you that if you are satisfied from the evidence that there has been such breach on the part of the defendant, then, in assessing the plaintiff's damages, it is your duty not only to take into account the breach of the contract
57 itself, which would be ground for the award of nominal damages, but also the direct and actual damages, if any, resulting therefrom. And for this purpose [you may take into consideration the element of damages already pointed out, namely, the excess, if any, of the fair market value of the property at the time of the breach, over the price agreed upon, to wit, $12,000;] and, secondly, the $250 paid by the plaintiff on account of the purchase price.

The position of the defendant in this case is this: while agreeing with the plaintiff that they entered into the written contract of April 27, 1905, offered in evidence, he insists that such written agreement expresses the exact contract made; that it was intended to be made

by both parties, and that he has at all times been, and is now, ready to comply with its terms, that is, to convey to the plaintiff the south 60 feet front by 200 feet in depth of said tract, but the plaintiff has refused to accept a conveyance of said part of the real estate, and therefore is guilty of a breach of said agreement, and hence the defendant is entitled to recover damages against the plaintiff here on account of such breach.

Therefore, if you should be satisfied from the weight of the evidence that the plaintiff has been guilty of such breach, then it will be your duty to return a verdict for the defendant for such damages as the evidence satisfied you that the defendant sustained; in which event you would take into consideration the excess, if any, of the price for which the plaintiff agreed to purchase the property, to wit, $12,000 over the fair market value of the property at the time of the breach, subject, however, to a deduction of the $250 received by him from the plaintiff on account of said contract.

The Court further instructs you, in the language of the defendant's eighth prayer, as follows:

"The measure of damages in this case is the difference, if any, between $12,000 and the fair cash value of the property included in the contract of April 27, 1905, between the plaintiff and the defendant at the time of the breach of said contract provided, that if you find for the plaintiff, you *shall* also include in the damages, if any, which you may award to him, the sum of $250, which he deposited with the defendant; and provided, further, that if you find for the defendant, you should deduct from the damages, if any, which you may award to him, the sum of $250."

I also instruct you, if the language of defendant's seventh prayer as follows:

"If you award damages to either party, you may also award interest thereon from the date of the breach of the contract for which such damages are awarded."

[Before the defendant is entitled to a verdict against the plaintiff he must satisfy you by the weight of the evidence as to two things: first, he must satisfy you that he intended and agreed to sell to the plaintiff the south 60 feet front by 200 feet depth of said property and no more, and that the plaintiff then and there intended and agreed to purchase so much of said real estate and no more.]

The defendant has submitted to you for the determination of this question not only the written agreement, itself, but also other testimony as to the attending and surrounding facts and circumstances.

58 The written agreement itself I should say to you, raises a presumption in favor of the defendant that it correctly states the dimensions of the real estate, or at least that it states the same approximately, and the defendant is entitled to the benefit of such presumption. [But you will understand that this is not a conclusive presumption, but is what the law calls a rebuttable presumption; and therefore it is that parol evidence has been admitted for the purpose of ascertaining and determining whether or not the parties understood that they were dealing with the whole of said real estate or

only a frontage of 60 feet by a depth of 200.] For, in the absence of such parol testimony, applying the contract to the subject matter thereof or showing anything to show that the measurements were not intended to be accurate, or approximately so, but only as an estimate of the contents of the whole property, the presumption would be that the written agreement correctly states the dimensions of the real estate, or at least that it states the same approximately.

[In the second place, the defendant must satisfy you by the weight of the evidence that he tendered himself ready and willing and able to comply with the terms of said contract, but was prevented from carrying out said contract by the refusal of the plaintiff to accept a conveyance of the south 60 feet front by 200 feet of depth of said real estate; or, in other words, that the plaintiff refused to carry out the terms of the contract.]

The Court further instructs you, in the language of the defendant's fourth prayer, as follows:

"If you believe upon all the evidence that when the defendant signed the contract *of* April 27, 1905, mentioned in the testimony, he understood it did not include, and was not intended to include the whole of his tract of land mentioned in the testimony, your verdict will be for the defendant."

The Court also instructs you, in the language of defendant's fifth prayer, as follows:

"If you believe upon all the evidence that when the defendant signed the contract of April 27, 1905, mentioned in the testimony, the plaintiff then and there understood that he would receive thereunder any portion less than the whole of what is described in the deed which was presented to the defendant for execution, your verdict will be for the defendant."

The intention of the parties to the written contract of April 27, 1905, in respect to what quantity of real estate was to be covered thereby, must prevail. [The contract itself, as I have already stated in substance, is *prima facie* evidence of such intention.] In the absence of proof to the contrary the presumption would be that it was not the intention of the par-ies to include the whole of said real estate but the part only described in the terms of their written agreement itself.

The plaintiff, however, having alleged in his declaration that it was the intention of bo n parties to this contract of April 27, 1905, to include the whole of said real estate and not simply a part of it,

59 and that the frontage and depth as named in said agreement were intended by both parties as a mere estimate of the whole property, and not as limiting the contract to a part of it only,

this being the situation of the controversy, [the Court has admitted parol evidence, not to alter or vary the written terms of the contract, but to enable you to determine to what the terms of the written contract apply, that is, whether they applied to the whole or to a part only of the real estate in question, for the purpose of enabling you to apply this description to the very subject matter that the parties intended it to apply to when they signed the contract.]

[Therefore, when I said to you a moment ago that the intention

of the parties to the written contract of April 27, 1905, as to the amount of real estate included and intended to be included therein, must prevail, you will understand that it is your duty to ascertain and determine such intention from all the evidence in the case, including the contract itself, as well as the preceding, attending and subsequent declarations and conduct of the parties, in so far as such declarations and conduct have been admitted in evidence by the Court for your consideration and guidance in this behalf.]

Gentlemen, you will now take the case [together with all its facts and circumstances] and guided thereby, and the instructions of the Court as to the law applicable thereto, you will return your verdict, bearing in mind that the cardinal rule that must control you is that the weight of evidence must be your guide. The burden of proof, as I have already said here, is upon the plaintiff, to satisfy you that the whole of this property was intended to be and was in fact included in that contract, instead of a part only. That he must satisfy you by the preponderance of the evidence.

When you go to your room, consider this case candidly, fairmindedly, and uninfluenced by any consideration of bias or prejudice either for one side or against the other, having due regard for each other's opinions. And in weighing the testimony, bear in mind that you are the sole judges of the weight of the testimony and of the inferences to be drawn therefrom; that you are at liberty to absolutely reject the testimony of any one or more of the witnesses whose testimony in the light of the whole evidence does not commend itself to you. By that I don't mean that you may simply, without good and sound reason for it, reject the testimony of any witness, but you are the judge of the weight of the evidence and of the consideration that is to be given to the testimony of each and every witness.

In this case, as I may say in all cases that go to juries, substantially all, I may say, there is more or less conflict of evidence, and it is your duty, if you can do so, to reconcile these difference- upon the theory that each witness has intended to tell the truth as he understands it. But, if you cannot so reconcile the testimony of any given witness upon that theory, then you are at liberty to entirely reject his testimony.

So then, giving due consideration to this case, and the instructions the Court has given you, a fair and candid consideration, you will return a verdict for whichever side you feel is justly and
60 rightfully entitled to your verdict under the evidence and the law as it was submitted to you.

Select one of your number as foreman to render your verdict.

Mr. BAILEY: "Will your Honor tell the Jury also that as to the preponderance of proof they are not to ascertain that by the number of witnesses. In view of what your Honor said it seems it would be well to mention the matter to them."

The COURT: "As reasonable men it seems to me you hardly need an instruction upon that point. A fact is not necessarily established either by the number or size or the age of witnesses. The testimony of one man may outweigh in the judgment of the jury the testimony

of half a dozen men. But where a given number of men agree that a fact is thus and so, with equal opportunity of knowing the facts and remembering them, and there stands over against the testimony of that number one man or two men, or a large disproportion, it is for you to consider how far the memory of half a dozen men should be considered over that of one man with equal opportunity to know the facts and remember them.

So you will not permit yourself for a moment to set up any arbitrary standard by which you are going to decide this case, but bearing in mind the general rules that I have given you, be influenced by the weight of the testimony and by the instructions of the Court applicable to this case, and return your verdict."

Thereupon, before the jury retired to consider of their verdict, the defendant, by his attorney, then and there objected, severally, to each of the portions of said charge enclosed within brackets, as hereinbefore set forth, upon the ground that the same permitted the jury to consider parol proof in determining the intentions of the parties to this suit, as to the quantity of real estate included in the contract of April 27, 1905, and was contrary to law and particularly to section 1117 of the Code of Law for the District of Columbia, and was contrary to the evidence adduced at the trial; and also, as to every such portion relating to damages, that there is no evidence tending to prove that the fair market value of the property claimed by the plaintiff to be included in said contract ever exceeded $12,000 and that there is no evidence tending to show that the plaintiff has sustained any damages in the premises; and also, upon the several grounds set forth in the preceding exceptions. But the Court then and there overruled said objections and each of them; to which ruling of the Court, and to each portion of said charge so enclosed within brackets, separately, as aforesaid, the defendant, by his attorney, then and there duly excepted, and the said exceptions were then and there severally noted by the said justice in his minutes.

No other or further testimony was adduced at the trial than as hereinbefore set forth. Each of the exceptions taken during the trial was duly taken and noted by the said Justice in his minutes as hereinbefore set forth, and was renewed by the defendant, by his attorney, immediately before the jury retired.

And thereafter, on the 7th day of March, 1906, the jury retired to consider of their verdict, and thereupon returned a verdict

61 for the plaintiff for the sum of $1250 with interest on $250 thereof from the 27th day of April, 1905; and thereafter, on the 4th day of May, 1906, judgment was entered for the plaintiff upon said verdict.

On the 2d day of April, 1906 the Court during the January, 1906 term thereof duly extended and prolonged the said term thirty-eight days in order to prepare this bill of exceptions, and on the 16th day of May, 1906, this bill of exceptions was presented and duly submitted to the said Justice for settlement, and the defendant, by his attorney, then and there duly prayed the Court to sign and seal this his bill of exceptions, which is accordingly done, *nunc pro tunc*, this 29th day of May, A. D. 1906; The matter contained in the sev-

eral "riders" hereto attached and also the map and photograph herein referred to having been inserted at the request of the plaintiff.

THOS. H. ANDERSON, *Justice.* [SEAL.]

The plaintiff, Ernst Loffler, objects to the foregoing bill of exceptions as not being in the form of, or in conformity with the rules, prescribed by the Court of Appeals of the District of Columbia, and containing matter that is totally immaterial and irrelevant and unnecessary to be inserted for the purpose of raising the questions of law involved in such bill, and also, because the record is thereby unnecessarily increased.

LEON TOBRINER, *For Pl't'ff.*

Noted:
THOS. H. ANDERSON, *Justice.*

This 29" day of May, 1906, the parties stipulate that the two (2) photographs and the map or plat used in evidence in the trial of this cause in the Circuit Court may be referred to and considered part of the record on appeal instead of being copied in the record.

LEON TOBRINER, *For Pl't'ff.*
LORENZO A. BAILEY, *For Def't.*

Order to Clerk for Preparation of Transcript of Record.

Filed July 23, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 47806.

ERNST LOFFLER
v.
HUGH HARTEN.

The Clerk will please prepare the transcript of record on appeal in this suit, including therein the following, viz:

1. Declaration (omitting notice to plead.)
2. Pleas.
3. Plaintiff's joinder in issue and replication.
62 4. Defendant's joinder in issue.
5. Verdict.
6. Order, April 2, 1906, prolonging term.
7. Judgment.
8. Memo: May 15, 1906, appeal bond, supersedeas, filed.
9. Bill of Exceptions.
10. Order extending time to file transcript in Court of Appeals.
11. This order.

LORENZO A. BAILEY,
Attorney for Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 116, inclusive, to be a true and correct transcript of the record as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47806 at law, wherein Ernest Löffler, is plaintiff and Hugh Harten, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington in said District, this 21" day of September, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1727. Hugh Harten, appellant, *vs.* Ernst Loffler. Court of Appeals, District of Columbia. Filed Sep. 27, 1906. Henry W. Hodges, clerk.

63 *Addition to Record per Stipulation of Counsel.*

Court of Appeals of the District of Columbia, January Term, 1907.

No. 1727.

HUGH HARTEN, Appellant,
vs.
ERNST LOFFLER.

Appeal from the Supreme Court of the District of Columbia.

Filed January 12, 1907.

In the Court of Appeals of the District of Columbia.

No. 1727.

HUGH HARTEN, Appellant,
v.
ERNST LOFFLER.

For the correction of certain clerical or typographical errors in the transcript of record herein filed September 27, 1906, the parties to this cause, by their respective attorneys, hereby stipulate and agree that the said transcript be amended as follows:

(1.) Near bottom of page 14, in the sentence, "that a line adjoins," etc., insert *lane* in lieu of *line.*

(2.) Near middle of page 29, in the question, "Can you recollect that you said," etc., insert *what* in lieu of *that*.

(3.) On page 100, two portions of charge excepted to and enclosed within parentheses, substitute brackets [ ] for parentheses ( ).

LORENZO A. BAILEY,
Attorney for Appellant.
LEON TOBRINER,
Attorney for Appellee.

[Endorsed:] No. 1727. Hugh Harten, appellant, *v.* Ernst Löffler. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Jan. 12, 1907. Henry W. Hodges, clerk.

64 TUESDAY, *March 19th, A. D.* 1907.

No. 1727.

HUGH HARTEN, Appellant,
vs.
ERNST LOFFLER.

The argument in the above entitled cause was commenced by Mr. L. A. Bailey, attorney for the appellant, and was continued by Mr. Leon Tobriner, attorney for the appellee, and was concluded by Mr. L. A. Bailey, attorney for the appellant.

65 October Term, 1906. No. 1727.

HUGH HARTEN, Appellant,
vs.
ERNST LOFFLER.

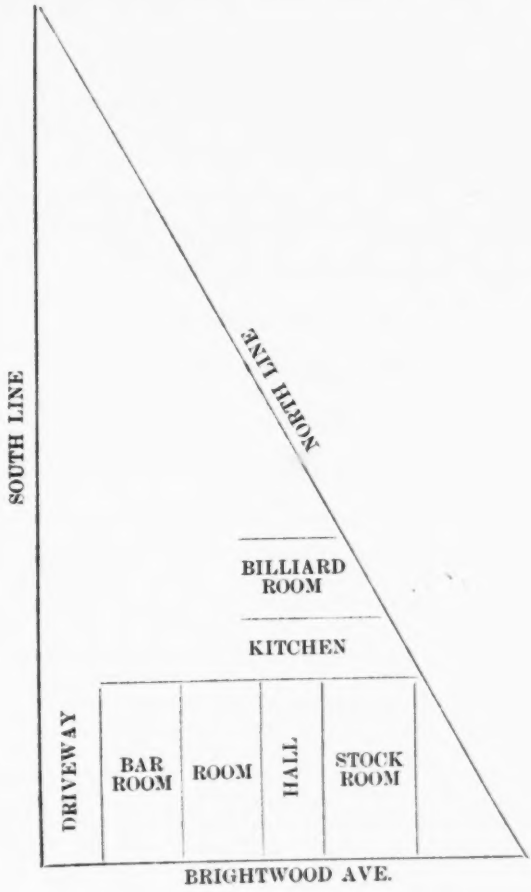
(*Opinion.*)

(Mr. Justice MCCOMAS delivered the opinion of the Court:)

The appellee, Ernst Loffler, sued the appellant, Hugh Harten, for breach of contract. The appellant owned a parcel of land on Brightwood Avenue, or Seventh Street road, a half mile north of Brightwood in this District. He there kept a saloon and country tavern in a building erected on a lot triangular in shape, fronting eighty-five feet on Seventh Street Road. As appears in the diagram the front line and the south line of the triangle formed a rectangle, and the south line was two hundred and twenty-four feet long. The hypothenuse, or north line, was two hundred and thirty-nine and a half feet long. The improvements fronted on the Seventh Street Road and comprised a frame building standing fifty-one and a half feet along the road. At the northeast corner was a small lot of ground with a front of thirteen and a half feet, the house line running back at right angles nearly joined the north line, making this

lot a triangle. On the south side was a driveway about twenty feet wide. At the south end of the building was a bar room and adjoining it on the north was a serving room for guests. A hallway came next on the north and on the north side of the hall was a store room for liquors, above which on the second story was a ball room. The remaining upper rooms of the house were used as living rooms for the family of the appellant. Back of the store room on the ground floor on the north line of the premises was a kitchen, and in the rear of that on the same north line was a billiard room for guests. In the rear of these structures, and all adjoining the north line, were various stables, sheds and out houses. The accompanying diagram will help to explain the shape of the lot and the location of the buildings.

66



Beginning at the south line of this parcel of land, if one measured sixty feet northward on the front line, the end of the sixty foot line was at a point in the hall doorway near the middle thereof, and only the south forty feet of the building would be included within the sixty feet, while eleven and a half feet of the north end of the building and a small triangular lot before described would be excluded. All the premises were occupied and used in their entirety by the appellant.

From the record, it appears the appellant told Charles D. Hood, a liquor dealer, that he wished to sell his property and business for Twelve thousand dollars; that he wished to get out of the neighborhood because he could not do business there and the protests made it difficult to renew his license. Hood communicated this information to the appellee who sent his agent to purchase the property.

67 This man introduced himself as a real estate agent to the appellee and asked him what he wanted for the place, and the appellant, said he would take Twelve thousand Dollars for the property, fixtures, and everything excepting pool tables and stock. Later this agent called with the appellee, who came as a prospective purchaser, and the appellant with knowledge of that conducted the appellee over the premises showing him over the whole building, upstairs and downstairs and into the kitchen and billiard room.

Several days later on April 27, 1905, after the appellee had sold his saloon in Georgetown, he notified the appellant that he would visit him to "make the deal," and the two parties and this agent met on the premises the same afternoon. The price asked by the appellant was finally agreed to and it was agreed that Mr. Richard, a wholesale liquor dealer, a friend of both parties, who had helped the appellee to sell his saloon and had driven out with him, should write the agreement.

During these negotiations, the appellant did not suggest that he did not intend to sell the whole premises or that he intended to reserve any portion, but said that the stock of liquors and the pool or billiard tables were not included in the sale. Richard wrote the following paper, which was signed by the appellant and his wife:

"APRIL 27, 1905.

For and in consideration of the sum of twelve thousand dollars two hundred and fifty dollars whereof is hereby acknowledged I hereby agree to sell to Ernst Loffler the property, good will, license and fixtures, located on Brightwood Avenue near Battle Ground Cemetery, fronting on Brightwood Avenue about sixty feet with a depth of about two hundred feet, title and transfer of license guaranteed or deposit refunded. I agree to use my best efforts to secure the signers for the transfer of said license and to give said Loffler a clear title to all of above property.

HUGH HARTEN,
JULIA HARTEN."

68 Richard testified when he had written as far as "license — fixtures located on Brightwood Avenue near Battle Ground Cemetery" he turned and asked, "what is the size of this place", and there followed a discussion between the two Lofflers, Harten and himself. One of the party suggested it was about sixty feet and Harten said "that is about right" and Richard so wrote it. Nothing was said by Harten or by Loffler to indicate that only a portion of the premises *were* to be sold and it was understood that the whole of the premises was covered by the description.

The appellee testified that in this discussion the appellant stated that the lot had about sixty feet front and about two hundred feet in depth; that when Richard was writing the contract "he asked Mr. Harten how much ground was in this place. We all were guessing and Mr. Harten said put it down about sixty feet front, and about two hundred feet deep, and Mr. Richard said all right, we will put it down that way:" That when the paper had been prepared, Harten called to Mrs. Harten and said to her "I want you to sign this contract, I sold the place." Before the contract was prepared, and while they were discussing the price, the appellant said to the appellee, I will sell everything here.

Andrew Loffler, the agent, testified that "when we came down to describe the place, Harten told him it was described in the license. Harten brought the license. The description in the license is 'opposite Battle Ground Cemetery'. Richard put that down and said we should describe the property a little plainer; he said, 'what is the square number or what is the number of the lot'; Harten said, 'there is no number to the lot'; he did not know the number of the square, so he said, 'we had better put down the number of feet you have here.' Somebody asked me what my idea was and I said about sixty feet; I looked out of the window to size it up; Mr. Loffler made a guess, and we all made a guess. Harten said put down about sixty feet; we estimated about sixty feet front and about two hundred feet deep."

69 Peter J. May testified that he met the appellee and his wife at Harten's place on the day after the sale and Harten stated that Loffler had bought him out, that he had sold the whole place, everything ground and all, and was going out of business, and this witness and Mrs. Loffler were shown through the house by Harten, who then described how she was going to fix up the house, and Harten conducted them into many rooms, including the liquor store room and the ball room above it. Later, the appellee asked the appellant to endorse the license paper and sign the application for its transfer. The appellee or his agent or attorney frequently repeated this request. Harten always refused to sign, at one time saying, he did not want family trouble. Finally when urged by the appellee and his attorney and being charged with attempting to back out of his agreement, the appellant replied "I won't sign a damn thing."

Subsequently the appellee tendered to the appellant the purchase money and a deed of the premises, and without reading it the ap-

pellant refused to sign and immediately after offered to the agent Loffler a hundred dollars "to get me out of this."

The first, sixth and eighth assignments of error raise the question of the admissibility of th. r-rol testimony we have stated, which tended to show in what sense the word "about" was used in the agreement, and to what property the agreement applied.

The writing in controversy was drawn by an unskilled person. Uncertainty arose concerning the property to which it applied. The Court below admitted this parol evidence of the surrounding circumstances and the negotiations preceding and accompanying the execution of the paper to ascertain and make plain the intent of the parties and the meaning of their contract so far as it was uncertain and especially to determine the subject matter of the contract, particularly the meaning of the word "about" in its collocation.

"Contracts, where their meaning is not clear, are to be construed
in the light of the circumstances surrounding the parties
70 when they were made, and the practical interpretation which
they, by their conduct, have given to the provisions in controversy." Lowber *vs.* Bangs, 2 Wall., 728, 737.

The Courts are disposed to uphold a contract drawn by a person unskilled in the use of legal terms, when in the contract there appears a reasonably sufficient description of its subject matter. When all the circumstances of ownership, possession and situation of the parties, their relation to each other and to the property, when the negotiations took place, and when the writing was made, are disclosed, if the meaning and application of the writing read in the light of those circumstances is certain and plain, the parties will be bound by it as a sufficient written contract. If a party who enters into an agreement in fact owns a parcel of land answering the description and only one such, that must be regarded as the one to which the description refers and if the language used includes the whole parcel, and though some chattels on the property be excluded, and no part of the parcel of real estate be excepted, and if the negotiations plainly show that at the time the writing was made, all the parties to the negotiations treated of the whole parcel and nothing less than, nor nothing other than the whole parcel, the extrinsic evidence which makes certain the description of the property included in the sale, is admissible to give effect to what was intended but what was not clearly expressed. See Mead *vs.* Barker, 115 Mass., 415; Slater *vs.* Smith, 117 Mass., 98; Farmer *vs.* Bates, 83 N. C., 392.

Extrinsic evidence is not admissible to explain a patent ambiguity, that is, one apparent on the face of the instrument, but is admissible to explain a latent ambiguity, that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; for this is but to remove the ambiguity by the same kind of evidence as that by which it is created. Extrinsic parol evidence is admissible to
give effect to a written instrument by applying it to its proper
71 subject matter. As Chief Justice Alvey has said: "It is a
well settled principle in the law of evidence that parol evidence may be received in aid of written evidence, in order either to

establish a particular document, or to apply it to its proper subject matter, or to explain it if its terms be of doubtful import; or to rebut some presumption which affects it. Light is generally thrown upon these questions by proof of the circumstances surrounding the parties, and with reference to which the written document was made." Whelan *vs.* McCullough, 4 App. D. C., 63; Okie *vs.* Person, 23 App. D. C., 182; Adkinson's Lessee *vs.* Cummings, 9 How., 478, 486. The use of the term "fronting on Brightwood Avenue *about* sixty feet with a depth of *about* two hundred feet" when these exact measurements would cut off one-seventh of a house and the narrow apex of a triangular lot, while all other terms describing the property to be sold would include the whole dwelling and the whole lot, made the case before us an instance of a latent ambiguity. Thereupon the construction given by the parties themselves as shown by their acts and admissions may be proved by parol testimony to solve this latent ambiguity. In giving effect to a written contract by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made; whenever without the aid of such evidence such application could not be made in the particular case. Bradley *vs.* Steam Packet Co., 13 Pet., 89, 97, 99.

It is true this contract was for the sale of land but for most purposes the Statute of Frauds has neither added to nor taken away from the stringency of the rules of the common law in regard to the admission of parol evidence to affect written contracts. Brown on Stat. of Frauds, Sec. 409. Nor was there any variance between the contract offered in evidence and that declared on. Warfield *vs.* Booth, 33 Md., 63. The Court below committed no error in admitting the parol testimony involved in the first, sixth and eighth assignments of error.

72 The second, third, fourth and fifth assignments of error relate to the measure of damages and to evidence concerning damages suffered by the plaintiff by reason of the breach of the contract sued on. The measure of damages as stated by the Court was the difference between the purchase price and the market value at the time of the contract of sale. The evidence to prove damage, bearing in mind that the contract of purchase included not only the entire real estate but the expected benefit of the license, the business and the good will, included evidence of the value of each of these and in admitting it the Court committed no error.

Nor did the Court err as claimed in the seventh assignment of error in admitting the deed tendered by the appellant in connection with the tender of the purchase money to the appellee. The testimony of Hood, who communicated to Loffler Harten's desire to sell this business and property which induced the negotiations between Loffler and Harten was properly admitted.

And we find no error in the testimony excluded and referred to in the ninth assignment of error. The transactions between the appellant and Brady had no relation to the contract between the parties to this suit. Nor was the proffered evidence and understanding between the appellant and his wife that he would reserve a part of

the property an offer of relevant evidence. Nor did the Court err in excluding the testimony of the witness Montague. We find no error under this ninth assignment.

The tenth, eleventh, and twelfth assignments of error relate to the rulings of the Court after the close of the testimony. The Court did not err in refusing to instruct the jury to return a verdict for the defendant. The second prayer was correctly refused. The question for the jury was not what was the fair cash value of a part of the property but whether or not the party for Twelve thousand Dollars had made a contract for the sale of the whole property. Nor
73 was the third instruction improperly refused for it limited the jury in construing the contract, to the defendant's intent, and the sixth instruction limited the jury to the plaintiff's intent in making the contract. Two minds must meet to make a contract. For this reason the Court erred in granting the fourth and fifth prayers of the appellant. Without discussing in detail the ninth, tenth, eleventh, fourteenth and fifteenth instructions asked for by the defendant, suffice it to say we find no error in their refusal by the Court below. Nor did the Court err in granting the first, second, third and fourth instructions on behalf of the plaintiff. In the instructions granted upon both sides and in the oral charge by the Court, we think the case was fairly presented to the jury and the Court committed no reversible error.

The judgment of the Court below must be affirmed, with costs, and it is so ordered.

74 TUESDAY, *May 7th, A. D.* 1907.

No. 1727, April Term, 1907.

HUGH HARTEN, Appellant,
vs.
ERNST LOFFLER.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE McCOMAS.
May 7, 1907.

THURSDAY, *May 9th, A. D.* 1907.

No. 1727.

HUGH HARTEN, Appellant,
vs.
ERNST LOFFLER.

A writ of error to remove the above entitled cause to the Supreme Court of the United States was prayed by Mr. L. A. Bailey, attorney for the appellant.

FRIDAY, *May 10th, A. D.* 1907.

No. 1727.

HUGH HARTEN, Appellant,
vs.
ERNST LOFFLER.

It is ordered by the Court that a writ of error to remove the above entitled cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of twenty-five hundred dollars.

75 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Hugh Harten Appellant, and Ernst Loffler, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of May, in the year of our Lord one thousand nine hundred and seven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

76 *(Bond on Writ of Error.)*

Know all men by these presents, That we, Hugh Harten, as principal, and Joseph Schiffman and William McGuire, as sureties, are held and firmly bound unto Ernst Loffler in the full and just sum of Twenty five hundred dollars ($2500.#) to be paid to the said Ernst Loffler, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of May, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Hugh Harten as appellant, and the said Ernst Loffler as appellee a judgment was rendered against the said Hugh Harten and the said Hugh Harten having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ernst Loffler citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Hugh Harten shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HUGH HARTEN. [SEAL.]
JOSEPH SCHIFFMAN. [SEAL.]
WILLIAM McGUIRE. [SEAL.]

Sealed and delivered in the presence of—

LORENZO A. BAILEY.
LORENZO A. BAILEY.
LORENZO A. BAILEY.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1727. Hugh Harten, appellant, *vs.* Ernst Loffler. Supersedeas bond on writ of error to Sup. Ct. U. S. Court of Appeals, District of Columbia. Filed May 16, 1907. Henry W. Hodges, clerk.

77 UNITED STATES OF AMERICA, *ss:*

To Ernest Loffler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Hugh Harten is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 18th day of May, in the year of our Lord one thousand nine hundred and seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 18, 1907.

LEON TOBRINER,
Attorney for Ernst Loffler.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 18, 1907. Henry W. Hodges, clerk.

78 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 77, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Hugh Harten, Appellant, *vs.* Ernst Loffler, No. 1727, April Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 18th day of May, A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,724. District of Columbia Court of Appeals. Term No. 91. Hugh Harten, plaintiff in error, *vs.* Ernst Loffler. Filed May 20th, 1907. File No. 20,724.

Office Supreme Court, U. S.
FILED.
JAN 16 1909
JAMES H. McKENNEY
Clerk

(20,724.)

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 91.

HUGH HARTEN, PLAINTIFF IN ERROR,

vs.

ERNST LÖFFLER.

BRIEF FOR PLAINTIFF IN ERROR.

LORENZO A. BAILEY,
Counsel.

LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

(20,724.)

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 91.

HUGH HARTEN, PLAINTIFF IN ERROR,

vs.

ERNST LÖFFLER.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This is a suit at law, instituted in the Supreme Court of the District of Columbia, wherein each party sought to recover against the other damages exceeding $5,000 for alleged breach of a written contract; the defendant's claim being presented by a plea of set-off. Upon a trial by jury verdict was rendered, and judgment was entered thereon, for the plaintiff, who is now the defendant in error; from which judgment the defendant, who is now plaintiff in error, appealed to the Court of Appeals of the District of Columba, wherein judgment was entered affirming the judgment of the trial court; to review which judgment of affirmance the case is brought to this court by writ of error.

The questions involved and stated in the specification of errors are raised by exceptions noted during the trial

and set forth in the bill of exceptions which forms part of the record.

The main question is whether or not the court erred in admitting parol testimony, offered by the plaintiff, for the purpose of proving that the words "about 60 feet" and "about 200 feet" were inserted in the contract as the result of an erroneous estimate, by the parties, of the dimensions of the entire tract of land owned by the defendant, and that when the defendant signed the contract it was understood and intended by him and by the plaintiff to include the entire tract, which is triangular in form, having a frontage of 85 feet with a depth of 224 feet on one side and 239.5 feet on the other side.

Another general question is as to the sufficiency of the evidence to prove that the fair market value of the license and property claimed by the plaintiff to be included in the contract ever exceeded $12,000 or that the plaintiff sustained any damages.

The contract (Rec., p. 11), is as follows:

"*April 27, 1905.*

"For and in consideration of the sum of Twelve thousand dollars two hundred and fifty dollars whereof is hereby acknowledged I hereby agree to sell to Ernst Loffler the property, good will, license and fixtures, located on Brightwood avenue near Battle Ground Cemetery, fronting on Brightwood avenue about 60 feet with a depth of about two hundred feet, title and transfer of license guaranteed or deposit refunded. I agree to use my best efforts to secure the signers for the transfer of said license and to give said Loffler a clear title to all of above property.

"HUGH HARTEN.
"JULIA HARTEN."

This contract has always been treated by the parties as indivisible and it was so considered at the trial.

The declaration (Rec., pp. 1–4) contains three counts,

in each of which it is alleged that the defendant, on April 27, 1905, agreed in writing to sell to the plaintiff, for $12,000, a certain tract of land situate in said District, together with the good will, license and fixtures of the saloon business conducted by the defendant on said land, all which was owned by the defendant; that the plaintiff then paid him $250 on account and afterward tendered him the remainder of said $12,000, but the defendant refuses to make conveyance in accordance with the agreement. The second and third counts differ from the first by the addition of averments that the plaintiff has lost the use and profits. The third count differs from the others by the addition of an averment that the plaintiff presented for execution a properly prepared conveyance.

The declaration states generally the location of said tract of land as situate on "Brightwood avenue, near Battleground Cemetery, in the District of Columbia," but wholly omits any statement of its area, or other description.

To each count, the defendant pleaded the general issue and also a plea of set-off (Rec., pp. 4, 5). In the latter plea he states the location of the tract owned by him as in the declaration; that the entire tract has a width of about 85 feet at the front on said avenue and a depth of about 235 feet from front to rear; that the southern 60 feet at said front by a depth of 200 feet is improved by buildings in which he carries on his barroom business and which contain fixtures used in the business; that the plaintiff, on April 27, 1905, agreed with him in writing to purchase from him for $12,000 the said southern 60 feet by 200 feet, together with the said license and fixtures and the good will of said business, and then paid $250 on account, but refuses to pay the remainder of said $12,000 although thereunto requested, and although the defendant has duly offered to perform his part of the agreement.

The plaintiff joined issue upon the first plea, and to the second plea replied not indebted and *non assumpsit*, upon which replications the defendant joined issue. Upon said issues the case was tried. The verdict awarded the plaintiff $1,250 with interest on $250 thereof, from April 27, 1905.

At the trial the plaintiff first adduced evidence locating and describing said tract of land and the improvements thereon (Rec., p. 8); next parol testimony, subject to exception, tending to prove that prior to the date of the contract, in a conversation with one Hood, a stranger to the transaction, the defendant had stated that for $12,000 he would sell the entire tract and his saloon business conducted thereon, and that Hood communicated this to the plaintiff who thereupon, through one Andrew Loffler, instituted the negotiations leading up to the contract, and that during the negotiations the defendant accompanied the plaintiff in an inspection of the entire property (Rec., pp. 9, 10, 11).

Next the plaintiff, subject to exception, put in evidence the contract in writing, to which the defendant objected, on the ground that it did not sustain the plaintiff's contention that he had purchased the entire tract (Rec., pp. 11, 12).

Next the plaintiff, subject to exception, adduced parol testimony tending to prove that when the contract was being written by one Richard in the presence of the parties and Andrew Loffler (Rec., p. 12), a general discussion arose as to the size of the tract (Rec., p. 23), and Harten said put it down about 60 feet and about 200 feet deep, and Richard said all right and wrote it down that way in the contract (Pltf. Rec., p. 18); that Harten, after signing the contract, requested his wife to sign, saying to her, "I sold the place" (Rec., p. 13).

Other facts established by the evidence are as follows:

Richard, who wrote the contract at the request of the

plaintiff, had previously signed a deed containing a description of the entire tract (Rec., pp. 19, 23, 24, 8). The plaintiff was familiar with the place (Rec., pp. 15, 18). On the south 60 feet by 200 feet the barroom was situated and the business had been conducted on that part of the tract for the past 50 years (Rec., pp. 17, 39). The plaintiff himself testified: "The barroom business and license is the principal thing that I was after" (Rec., p. 17).

Testimony offered by the defendant tending to prove that this portion of the tract was sufficient to carry on the business was excluded by the court (Rec., pp. 40–41). The defendant's contention that parol testimony was admissible to locate the portion of the tract covered by the contract and thus explain the contract, but that the parol testimony offered by the plaintiff tending to prove that the defendant intended to sell the entire tract was not explanatory, but was in contradiction of the contract and therefore inadmissible, was overruled by the court.

Prior to the institution of the suit the plaintiff caused to be prepared a deed, to be executed by the defendant and his wife, conveying to the plaintiff the entire tract together with the good will, bar fixtures and saloon license. He requested the defendant to execute the deed and at the same time offered to pay the defendant the balance of the purchase money. The defendant refused to execute the deed, but offered to convey to the plaintiff the south 60 feet front by 200 feet in depth of said tract, together with the good will, fixtures and license claimed by the plaintiff, but this offer was refused by the plaintiff, who demanded the entire tract (Rec., pp. 28, 29, 27, 48, 49). Thereafter the defendant offered to return to the plaintiff the $250.00 deposit mentioned in the contract and sent him a check for that amount but the plaintiff refused the offer and returned the check to the defendant (Rec., pp. 48, 49, 29, 27).

Richard testified on behalf of the plaintiff and subject to the defendant's exception as to parol testimony:

> "So far as I recollect I wrote as far as license, fixtures located on Brightwood avenue near Battle Ground Cemetery, and I turned then and asked, 'What is the size of this place?' There was a sort of general discussion that arose between Mr. Loffler and Mr. Harten and myself, and the other Mr. Loffler. Some one suggested it was about 60 feet. Just who that was I am unable to say; I don't remember. We all assented to that. Mr. Harten agreed and said 'that is about right' and the figures were put in that way" (Rec., p. 23).

The plaintiff himself testified, subject to the defendant's exception, that Richard said, "How much ground is in this place," and that Harten replied, "Put it down about 60 feet and about 200 feet deep;" that this was the *exact language* used (Rec., p. 18, middle).

The defendant testified: "There was a discussion about 60 feet and after they decided among them about 60 feet I said 'I guess that will be about right. I was talking about the saloon, how far 60 feet would cover from the south;" that they were not talking about the entire front of the property; that in all the preceding conversations and negotiations the subject-matter had been referred to as the "place" or as the "saloon" (Rec., pp. 44, 45). And upon cross-examination the plaintiff himself testified that in all his conversations with the defendant nothing was ever said about the amount of real estate included in the sale, but that they talked only about the barroom business and license (Rec., p. 18 bottom, p. 19 top); that the business and license was the principal thing that he was after (Rec., p. 17).

Further testimony adduced by the plaintiff and other testimony tendered by the defendant, but excluded, appears in the following specification of errors:

Specification of Errors.

At the trial the court erred to the prejudice of the defendant, and subject to exceptions then duly noted, as follows:

I.

In admitting in evidence over the defendant's objections, certain parol testimony adduced by the plaintiff for the purpose of proving that the written contract of April 27, 1905, for the sale of property having a frontage of "about 60 feet with a depth of about two hundred feet," was understood and intended by the parties to include the entire tract of land owned by the defendant, having a frontage of 85 feet with a depth of 224 feet on one side and 239½ feet on the other side; the full substance of such parol testimony being as follows:

1. Witness C. D. Hood:

Sometime prior to April 27, 1905, Mr. Harten came to me and told me that he wanted to sell his place, and I asked him what he wanted for it, and he said $12,000. I said, what are you going to sell? He said the property and the business. I said, what will you take for your business and rent the property? He said, when I sell my business I want to sell everything. I want to get out of the neighborhood; I can not live there; the people harass me to death, and I can not do business. His license was a little entangled. I communicated what Harten said to me to Loffler (Rec., pp. 9–10).

2. Witness Ernst Loffler, the plaintiff:

Q. Did you have any negotiations with Mr. Harten in respect to the purchase of his place of business on Brightwood avenue (Rec., p. 10)? A. Yes; after I first found out from Charles Hood that Harten wanted to sell the property. Then I had a conversation with Mr. Richard about it. After that I went to Mr. Andrew

Loffler who was then in the real estate business. I sent him out to negotiate with Mr. Harten. After he had been to see Harten I phoned Harten that I was coming up to buy his place, and he said it was all right. On the strength of that I went right out with Richard in his buggy. I also phoned to Andrew Loffler, and he was at Harten's place when we got there. We met Harten there. We talked about buying the property. Two days before this Andrew Loffler and I were out there and Harten showed us the property (Rec., p. 11). Richard wrote the contract in the little room back of the bar in the presence of Andrew Loffler, Harten and myself. Richard got his instruction or information as to what to put in the paper about the description of the property from Harten. Q. What did Harten say in respect to the front and depth of the property when Richard was writing this paper? A. He said it was about 60 feet in front and about 200 feet deep. Those were all the words that were said. Harten brought his liquor license in from the barroom into the little room where we were and told Richard, "you can copy it off of this. This will be the best description of the place. That is the way it lies" (Rec., pp, 12, 13).

Q. State what Mr. Harten did, if anything, about showing you and your wife over the property the next day? A. He took us substantially through the same rooms he had taken me through previously—through the whole building (Rec., pp. 13, 14). Q. When you went out there and talked with Mr. Harten about buying this place, did he tell you he expected to keep a portion of this property for himself? A. No, sir. I expected to get the whole tract of land, the whole house, and exerything that belonged to the tract of land (Rec., p. 19, middle).

3. Witness Andrew Loffler:

Q. What was said to you by Mr. Harten as to what he had for sale? A. Mr. Loffler came to me and said he

was trying to get a place located on Brightwood avenue and that he heard that Mr. Harten's place was for sale. I went to see Harten and introduced myself. I told him I was in the real estate business and that I could get him a customer. I asked him how much he wanted for his place and he told me $12,000. I asked him what was included and he said the property, the fixtures, at least everything except the pool tables and his stock. I then went to Mr. Loffler and reported what Mr. Harten had told me. After that I told Harten I had a purchaser for the place. About a week before the agreement was signed I took Mr. Loffler out and showed him the place. We looked over the property. Mr. Harten took us through the whole building on the place. He showed us all the different rooms he had. . . . The subject-matter of conversation between Loffler and Harten was: He was to sell Loffler the whole property, everything except the stock (Rec., pp. 19, 20). . . . We met at Harten's place and called him in. I told him that Loffler was satisfied to close the deal, had a deposit with him and everything was satisfactory. Somebody asked me to write the agreement but I thought I would have nothing to do with it and *have no trouble.* Richard agreed to write it because he was familiar with that kind of business. When he came down to describe the place Mr. Harten told him it was described in the license and brought the license in. The description in the license is "Opposite Battleground Cemetery." Richard put that down and said we should describe the property a little plainer. . . . So he said we better put down the number of feet you have here. Somebody asked me what my idea was and I said about 60 feet. I walked and looked out of the window to size it up. Mr. Loffler made a guess and we all made a guess. Harten said put down about 60 feet. We estimated about 60 feet front and about 200 feet deep (Rec., pp. 20, 21).

4. Witness Peter J. May:

Some time last April I met Mr. and Mrs. Ernst Loffler at Harten's place. Harten brought Loffler in and said that Loffler bought him out; that he sold out the business; did not want his wife behind the bar and was going out of town. He said he had sold the whole place (Rec., p. 24).

5. Witness Anna Loffler, wife of plaintiff:

One or two days after the contract I went to Harten's place with my husband. We said we came out to look over the place. Harten took us through the house; all over the building. . . . After that I asked Mrs. Harten if she objected to her husband selling the business and property and she said "No." Harten was standing right there within hearing (Rec., pp. 24, 25).

The defendant based his objections to said testimony upon the grounds that the same was immaterial, incompetent and inadmissible; that all negotiations were merged in the written contract; that the plaintiff must stand upon the contract as written (Rec., pp. 9 to 14, 19 to 21, 24).

II.

In admitting in evidence, over the defendant's objections, and also in refusing to strike out on the defendant's motion, parol testimony adduced by the plaintiff, as follows:

1. Witness E. Loffler, plaintiff:

Before the contract was signed Harten said the amount of businsss he was doing there was $75 a day and some Saturday's $125 (Rec., p. 14).

2. Witness Andrew Loffler:

The day I brought Loffler to Harten, the latter said he done a good business there; that it was the only saloon from that point up. He said he done $75 a day and $125 on Saturdays. He did not say exactly, but about that much (Rec., pp. 21, 22).

The plaintiff, on cross-examination, testified that he had made no inquiry of Harten, or of anyone else, as to the amount of the business, because he was familiar with the place and knew as much about it as Harten did. Whereupon the motion to strike out was made, based on the ground that the plaintiff did not rely, and had no reason to rely, on said statement of the defendant (Rec., pp. 17, 18, 22).

3. Witness E. Loffler, plaintiff:

Before making the contract, I told Harten I would have to dispose of my business in Georgetown before I could buy his business. My business was a profitable one. I sold it the same day Harten signed the contract (Rec., pp. 14, 15). According to what Harten said he was taking in there, his business ought to be worth between $10,000 and $11,000, leaving out the real estate (Rec., p. 15). A fair rental for the property, taking in that much money, would be $125 or $150 a month (Rec., p. 16).

4. Witness R. L. Montague:

Assuming that Harten's business runs $75 a day and $125 on Saturdays, the property would be worth from $12,000 to $15,000 (Rec., p. 25).

5. Witness Helwig:

If Harten's place was doing a business of from $50 to $75 a day, and $125 on Saturdays, the reasonable rental value would be $75 to $100 a month, and the market value of the business, leaving out the realty, would be from $10,000 to $12,000 (Rec., p. 26).

III.

In excluding and refusing to admit in evidence testimony offered by the defendant, being the testimony sought to be elicited by the following question put to the witness Montague:

Q. Suppose the receipts from Harten's business amounted to $150, to $200, a week; that the real estate

was worth in the neighborhood of $4,000, with the improvements—the land, the buildings on it, the entire tract as described in the testimony here—what would be a fair price to pay for that land, with the buildings on it and the improvements and fixtures and the liquor license and good will of the business, but not including any of the stock in trade (Rec., p. 32)?

IV.

In refusing and overruling the several motions of the defendant, at and after the close of all the testimony, to instruct the jury as follows (Rec., pp. 50, 51, 52):

(1) To return a verdict for the defendant.

(2) "II. If you find upon all the evidence that the fair cash value of the property included in the written contract dated April 27, 1905, between the plaintiff and the defendant and mentioned in the testimony, including the defendant's barroom license and the good will of the barroom business, conducted by him under said license and so much of the real estate owned by the defendant and upon which he was then conducting said business as was necessary for the convenient operation of said business and having a front of sixty feet more or less on Brightwood avenue with a depth of 200 feet more or less, together with the fixtures thereon used and required for use in and about said business, was less than $12,000 at the time when the plaintiff's attorney returned to the defendant's attorney the check for $250, as shown in the evidence, you will, in your verdict, award damages to the defendant for the difference between the said fair cash value and the sum of $12,000, less said sum of $250; provided such difference, if any, exceeds $250."

(3) "X. It was the duty of the plaintiff to investigate and ascertain for himself the value of Harten's business; and if you believe upon all the evidence that he was misinformed by Harten, as to the amount of the receipts of the business, but that

he did not rely upon what Harten told him as to the said receipts, and that he knew or should have known that the receipts of the business did not amount to as much as was stated by Harten, and that he was not misled by such statement, you will not consider the said statement as having any bearing upon the question of the value of the business or as affecting the measure of damages."

(4) "XI. It was the duty of the plaintiff to investigate for himself as to the dimensions of the entire tract in question, if he thought he was buying the entire tract, and if you believe upon all the evidence that the plaintiff or the witness Richard knew or should have known at the time Harten signed the contract of April 27, 1905, that the front of the entire tract was 85 feet, or much more than 60 feet, and was not 'about' 60 feet, your verdict will be for the defendant."

(5) "XIV. Your verdict must be the result of your concurrence upon the facts established by the evidence. In reaching such a result it is the duty of each juror to stand by his own individual judgment and understanding and not to surrender to the views of other jurors. In case of apparent inability to concur in a verdict, it is proper that you should express to each other your reasons for your respective opinions based wholly upon the evidence and to endeavor in that way to agree upon a verdict, which shall be in accordance with the weight of the evidence and the instructions given you by the court."

(6) "XV. The intention of the parties to the written contract of April 27, 1905, must prevail. Their intention is to be ascertained if possible, from the words of the written contract itself, according to the meaning of such words, in their ordinary acceptation and every day use, and every word in the contract is to be considered as a part of the expression of the intention of the parties. Any doubt as to the meaning of the words used in the contract should be determined in favor of the defendant."

V.

In portions of the charge to the jury, as follows (Rec., pp. 55, 56):

> "[If the jury believe from the evidence that the defendant agreed in writing to sell to the plaintiff the good will, license, and fixtures of the business carried on by him, located on Brightwood avenue, near Battle Ground Cemetery, as also the real estate and improvements upon, and in which the said business was carried on, for the gross sum of $12,000; that the plaintiff paid to the said defendant the sum of $250 on account of the purchase money aforesaid; that plaintiff tendered himself ready and willing, and was able, to comply with the terms of said sale, and pay the purchase money aforesaid; and that the defendant refused to transfer and convey to the plaintiff the said good will, license, fixtures, and real estate aforesaid, then the plaintiff is entitled to recover, notwithstanding they may find in the written contract for sale the frontage and depth of said real estate was erroneously stated.]"
>
> "[In other words, gentlemen, if you are satisfied from a fair preponderance of the evidence in this case that at the time the contract of April 27, 1905, was signed by the defendant, Harten, the plaintiff, Loffler, understood he was thereby purchasing, and the defendant understood he was thereby selling the whole of said real estate, including the fixtures, license, and the good will of defendant's business, and that in writing into the agreement the frontage and depth of the real estate it was inaccurately stated as having a frontage of about 60 feet and a depth of about 200 feet, and that those figures were employed as an approximate estimate of the said frontage and depth and as sufficient for the purposes of the contract to cover the whole of the said real estate, then your verdict must be for the plaintiff.] [And in that event the measure of damages, or the amount of damages to which the plaintiff would

be entitled would be, first, the excess, if any, of the fair market value of said property at the time of the breach of said contract, over the price the plaintiff agreed to pay for it;] secondly, the amount paid by the plaintiff to the defendant on account of said purchase price, which sum, it was agreed by both sides, was $250."

Rec., pp. 57, 58:

"[But you will understand that this is not a conclusive presumption, but is what the law calls a rebuttable presumption; and therefore it is that parol evidence has been admitted for the purpose of ascertaining and determining whether or not the parties understood that they were dealing with the whole of said real estate or only a frontage of 60 feet by a depth of 200.]"

Rec., pp. 58, 59:

"[Therefore, when I said to you a moment ago that the intention of the parties to the written contract of April 27, 1905, as to the amount of real estate included and intended to be included therein, must prevail, you will understand that it is your duty to ascertain and determine such intention from all the evidence in the case, including the contract itself, as well as the preceding, attending, and subsequent declarations, and conduct of the parties, in so far as such declarations and conduct have been admitted in evidence by the court for your consideration and guidance in this behalf.]"

Points and Authorities.

I.

The parol testimony referred to in the first specification of error was admitted on the pretext that it aided the jury in determining the meaning of the word "about," as used in the written contract; thus relieving the plaintiff of the burdensome limitations placed by the Statute

of Frauds upon the right of one man to acquire land belonging to his neighbor, and providing an occasion for revision and new editions of all standard dictionaries.

The word "about" (adverb) means nearly, approximately, with close correspondence in quality, manner, degree, quantity, number, etc.

Webster's Int. Dict.

In many cases, the use of this word in conveyances or contracts for land, has rendered such contracts and conveyances unenforceable for want of certainty.

In Finelite *vs.* Sinnott, 5 N. Y., Supp., 439,440, it was *held*, a deed of land being "about" 30 feet wide does not fix the dimensions with sufficient certainty to convey the property.

In Shipp *et al. vs.* Miller's Heirs. 15 U. S., 2 Wheat, 316, 326, the entry was for 1,000 acres "on a spring branch about six miles a northeastwardly course from Stoner's Spring, to include a tree marked," etc. The distance to the branch and the tree was 4½ instead of 6 miles and the course not northeastwardly, and the entry was therefore held void for uncertainty.

In Johnson *vs.* Pannell's Heirs, 15 U. S., 2 Wheat., 206, 211, the court, per Marshall, C. J., stated that reasonable certainty has always been required of the general or descriptive call and also of the particular or locative call, and that—

> "in ascertaining a place to be found by its distance from another place, the vague words 'about' or 'nearly' and the like, are to be discarded, if there are no other words rendering it necessary to retain them; and the distance stated is to be taken positively."

To the same effect is Bodley *vs.* Taylor, 9 U. S., 191, 225.

In the case at bar the word "about" is used in the "general or descriptive call," and under the foregoing decisions the word may be rejected, or else it must be taken as rendering the agreement too uncertain for enforcement, as in the cases in 54 Md., 187, 1 Har. & G., 435, 6 Gill., 59 and 102 Mass., 24, *infra*. The agreement was apparently intended as tentative, and left it open for the parties to locate the portion of the real estate intended to be conveyed with the business and describe the same in a subsequent writing. Failing to do so, neither can complain.

The parties are reciprocally bound by the agreement, if it is binding on either, and the rules by which the liability of the parties and each of them is to be tested should also work reciprocally. As an illustration let us suppose that the entire tract was in fact only 60 by 200 feet and the agreement had called for "about" 85 by "about" 224 or more feet. In such case Harten could not require Loffler to complete the agreement, nor could he defeat a claim by Loffler either for the entire quantity stated in the agreement or for abatement in the price. Hence, Loffler must be held by the agreement as it is written, not only by the force of the doctrine of mutuality but also by the principles declared in the following decisions:

54 Md., 187, 204, 39 Am. Rep., 374, *infra*.
23 Fed. Cas., 964, 968, Thomas *vs.* Perry.
40 Ohio St., 341, Stevens *vs.* McKnight.

In Thomas *vs.* Perry, *supra*, the deed purported to convey "about 2,600 more or less." This was held to be a warranty of the quantity, and that a deficiency of 1,000 acres entitled the grantee to relief in equity.

In Stevens *vs.* McKnight, *supra*, the contract called for "about" 140 acres. This was held to represent that

the actual quantity was a near approximation to 140 acres, and a deficiency of 5_{100} acres, valued at $55 per acre, was too great a variation.

A shortage of 23 feet in the depth of a city lot, described as "about" 4 rods front and 250 feet in depth, constituted such a substantial defect as will excuse performance on the part of the purchaser.

90 N. Y. S., 796, 98 App. Div., 474, Albro *vs.* Gowland.

And in Lipscomb *vs.* Watrous, 3 App. D. C., 1, 7, the court declared the "settled doctrine" as laid down in 10 Wall., 359, that when, from any cause, a—

> "contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

The general well settled rule is as laid down in Bigham *vs.* Madison, 103 Tenn., 358, 362, 47 L. R. A., 267, that a vendee of land, when it is sold in gross or with the description "more or less" or "about," does not thereby *ipso facto* take all risk of quantity, but the use of these or similar words in designating quantity, although they show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency; citing the following cases:

14 N. Y., 143, 158, Belknap *vs.* Sealey.
19 Ark., 102, 110, Harbell *vs.* Hill.
61 Ark., 120, Drake *vs.* Eubanks.
22 Fed. Cas., 1,192, Stebbins *vs.* Eddy.
4 N. J. Eq., 212, 216, 217, Couse *vs.* Boyles.
37 W. Va., 715, 720, 723, Pratt *vs.* Bowman.
69 Tex., 293, Wheeler *vs.* Boyd.
66 N. H., 136; 9 L. R. A., 50, Newton *vs.* Tolles.

The word "about" gives a margin for a moderate excess in, or diminution of the quantity mentioned and imports that the actual quantity is a near approximation to that mentioned.

54 Md., 187, *supra.*
74 Mich., 416, 421, Sample *vs.* Pickard.
40 Ohio St., 341, *supra.*
7 Ind. App., 462, 467, 468, Indianapolis Cabinet Co. *vs.* Herrman.

But when the effect of the ruling complained of is considered in reference to the Statute of Frauds, a serious question is presented.

The Code D. C., sec. 1117, requires an agreement for the sale of land to be in writing and signed by the party to be charged. This excludes oral evidence of such an agreement in whole or in part. "An agreement, to be within the Statute of Frauds, can not be partly in writing and partly in parol."

11 G. & J., 314, 322, Moale *vs.* Buchanan.

The original Statute of Frauds, 29 Car., II, ch. 3, was enacted for the declared purpose of the "Prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury."

Alex., Br. Stat., 508.

The common law rule for excluding oral evidence as to written contracts rests upon the presumption that the parties waived all stipulations not put in the writing. But under the Statute of Frauds the oral evidence is rejected because it is the policy of the law to regard it as untrustworthy *per se.*

1 Reed, St. Fr., secs. 12, 15.

The difference between the two rules is shown by the case of a written contract, on its face manifestly incomplete. If the subject-matter of the contract is within the Statute of Frauds, no oral evidence can be received to supply the defects of the writing; whereas the common law rule is no bar to such admission.

Id., sec. 12, citing many authorities.

In one of the cases cited by Reed, *supra*, a deed failed to include 17 acres which the defendant had agreed to sell to the plaintiff. Upon a bill for conveyance of the 17 acres, the court said:

> "It makes no difference whether the want of a writing was accidental or intentional, by way of refusal or by reason of mutual mistake; nor that there were false representations and a pretense of conveying the land, but a fraudulent evasion." . . . "From the oral agreement there can be derived no legal right, either to have performance of its stipulations or written evidence of its terms." . . . "When the omitted term or obligation is within the Statute of Frauds, there is no valid agreement which the court is authorized to enforce, outside of the writing. In such case, relief may be had against the enforcement of the contract as written." . . . "But rectification by making the contract include obligations or subject-matter to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the Statute of Frauds as if there were no writing at all." . . . "In Parkhurst *vs.* Van Cortlandt, 14 Johns., 15, 32, it is said that 'where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing.'"

The court also cites 11 G. & J., 314, *supra*, 19 Conn., 63, and other cases. As to reformation, the court said:

> "The difficulty is, that, if the fraud vitiates and defeats the instrument, then the modified agree-

ment to be enforced must be that which is proved by parol evidence; and this seems to violate the statute." . . . "When it is sought to extend that power to interests in land not included in the instrument, and in relation to which there is no agreement in writing, the case stands differently. Fraud may vitiate the writing which is tainted by it; but it does not supply that which the statute requires." . . . "In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one, by its decree."

102 Mass., 24, 30, 34, 35, 37, Glass *vs.* Hulbert.

Balto. Per. Bldg. & Land Society *vs.* Smith, 54 Md., 187, was a suit by the vendee for damages for breach of contract for sale of land, said to comprise "about 65 acres." The tract was found to contain only 36 acres, and the purchaser refused to accept a deed for that amount or anything less than 65 acres. Parol evidence as to representations made by the vendor's agent as to the quantity of land was held inadmissible (199). The court said:

"In such case the appellee (vendee) must stand or fall upon the terms of the written paper, and it is not competent for him to set up by parol another and different contract from that on which he has declared," . . . "and this objection applies with special force in a case like the present, where the contract is within the Statute of Frauds and required to be in writing" (p. 202, citing 9 Gill, 205).

The court held that "about 65 acres" means within a fraction of an acre or may cover a discrepancy of one or two acres, but that the appellee was not bound to accept a conveyance of 30 or 36 acres (p. 204).

In Taney *vs.* Bachtell, 9 Gill, 205, the court said (p. 211):

> "We are sometimes misled by applying to one class of cases *dicta* to be met with in the books used in reference to a different class. This being a contract relative to land must be, every part of it, in writing, and can not be valid if partly in writing, though the deficiency could be supplied, if verbal testimony was admissible." . . . "The policy of the law is to prevent fraud and perjury by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever."

Otherwise the clause in the Statute of Frauds which relates to lands would be without meaning.

In Thomas *vs.* Turvey, 1 Har. & G., 435, the court held (p. 438) that a deed for part of a tract of land, designating the quantity, but without any description of the part sold, was void, and that "the ambiguity on the face of the conveyance could not be explained by extrinsic circumstances" (p. 439).

In Dorsey *vs.* Wayman, 6 Gill, 59, 66, the court held that the description of the land was too uncertain, because—

> "the contract gives only the line adjoining the turnpike; what are the other courses and distances of the land sold can not be known from the agreement itself or by anything referred to in it."

The description was—

> "all that part of a tract of land called Range Declined, lying adjoining the turnpike road near where Woodward now lives."

In Powers *vs.* Rude, 14 Okla., 381, 79 Pac., 89, 94, 95, *held* that a contract which did not sufficiently disclose on its face or by reference to any other instrument the land that was to be conveyed, was clearly within the Statute of Frauds and therefore void.

In Williams *vs.* Morris, 95 U. S., 444, the court said that unless the essential terms of the sale can be ascertained from the writing itself or by reference in it to something else, the writing is not a compliance with the statute, and if the agreement be thus defective it can not be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. In support of this the court cites numerous authorities.

"No prior negotiations can be resorted to for the purpose of eking out a binding contract."

1 John. Ch., 273, 279–282, Parkhurst *vs.* Van Cortlandt, cited in 3 App. D. C., 6.

In the light of the foregoing well considered decisions, the agreement would be wholly unenforceable and void except for the fact that it mentions the good will and license; thus indicating and referring to the barroom business, and admitting the inference that about 60 feet by about 200 feet of the land used or required for use in that business was included in the agreement. The defendant's plea of set-off rests on the theory that parol evidence may be resorted to for the purpose of identifying or locating what is thus indicated and referred to in the written contract, and the plaintiff himself testified (Rec., p. 17), "The barroom business and license is the principal thing that I was after."

But the plaintiff's theory, which was adopted by the court at the beginning of the trial, was that he could allege a written contract calling for the entire tract, and then sustain his allegations with a written contract calling for only a part of the tract, and meet the objection of variance by parol testimony contradicting the terms of the written contract and tending to establish an oral agreement and understanding for the sale of the entire tract instead of the quantity designated in writing.

This opened the door to all the evils which the original Statute of Frauds sought to exclude, and is contrary to well established rules concerning all written agreements.

The question in the construction of written instruments is not what was the intention of the parties, but what is the meaning of the words they have employed. Oral evidence can not be resorted to "for the purpose of contradicting or varying the language actually employed."

110 Ill. App., 381, 386, Cameron *vs.* Sexton.

This agreement was written by Richard, who was taken by the plaintiff to Harten's place for the purpose of writing it, and who prepared and wrote it on behalf of the plaintiff (Rec., pp. 19, 23). Richard knew the dimensions of the entire tract (Rec., pp. 23, 8), and his knowledge must be imputed to the plaintiff, who is thus estopped to assert the contrary.

If there be room for construction, it must be favorable to the defendant.

> "A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him."

76 U. S., 9 Wall., 394, Noonan *vs.* Bradley.

Where a written contract was prepared by the plaintiff and contained conflicting provisions, it should be construed most strongly in favor of the defendant.

84 S. W., 1041 (Ark.), Allen-West Commission Co. *vs.* People's Bank.

A contract ambiguous in terms must be construed as unfavorably, as its terms will admit against the party who proposed the contract and prepared it.

84 S. W., 491, 493 (Ark.), Leslie *vs.* Bell.

The plaintiff testified that after he heard that Harten wanted to sell he sent Andrew Loffler out to negotiate with Harten (Rec., p. 11), and followed that up by taking Richard out with him for the purpose of writing the agreement (Rec., pp. 19, 23).

If it was then understood by the parties that the agreement was to cover the entire tract, the general term "my property" would have been used without stating dimensions. But, instead, the draftsman, acting for Loffler, employed the definite article "the," so that the descriptive call in the agreement may be read, "The property fronting on Brightwood avenue about 60 feet, with a depth of about 200 feet." These figures must be taken as a limitation upon the words "the property," and these latter words could well be taken as referring only to the "saloon business," with the use of so much of the real estate as comes within the limitation. They could not be extended to include the title to the land except for the defendant's concurrence in such interpretation.

The agreement is on its face ambiguous. It does not mention "land" or "real estate," or "improvements." It contains none of the words apt or usual in reference to land.

Throughout the testimony the several witnesses used the expression "saloon property," in reference to the business alone, including license and good will, without intending the expression to include ownership of the land occupied in conducting the business. The plaintiff himself testified that he had previously bought "saloon properties" and knew their value, but his testimony as to such value excluded the real estate (Rec., pp. 15, 16), and his contract with McCullough (Rec., p. 34), shows on its face that the "saloon property" then owned by him did not include title to any real estate. His expert witnesses, Messrs. Montague and Helwig, use the expressions "saloon properties" and "saloons" in the same sense, excluding title to land (Rec., pp. 25, 26).

Under these circumstances it might have been contended by the defendant, with great force, that it was in this sense the words, "the property," were employed in writing the agreement.

Without anything in the agreement to indicate that Harten owned any property, located on Brightwood avenue and fronting thereon and near Battle Ground Cemetery, or to indicate of what "the property" consisted, a case of patent ambiguity is presented. But whether *ambiguitas patens* or *ambiguitas latens*, it is clearly one of those cases which can be helped only by election and not by averment. Lord Bacon, in his Maxims, stating what is the recognized basis of the law governing this subject, says:

> "Of these, infinite cases might be put; for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty. But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact, and therefore, it shall be holpen by averment, whether of them was that the party intended should pass. So if I set forth my land by quantity, then it shall be supplied by election, and not averment. As if I grant ten acres of wood in Sale where I have 100 acres, whether I say it in my deed or no, that I grant out of my 100 acres, yet there shall be an election in the grantee, which ten he will take. And the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken; and there being no cause to help the uncertainty by intention, it shall be holpen by election."
>
> 1 Best on Evid. (Morgan's Ed.), sec. 226, pp. 425, 426.

Therefore (as the agreement is not divisible and if it be not wholly void for uncertainty), it would be for the plaintiff to elect what part of the defendant's tract he will take, were it not for the fact that in order to take the "good will, license, and fixtures" included therein he must take the south sixty feet, which includes the barroom and the driveway leading to the "Summer Garden" back of the barroom.

Dealing with the agreement as a case of latent ambiguity so far only as concerns the location of the 60 by 200 feet, parol testimony was admissible only to remove that ambiguity. The defendant's theory, upon which his plea of set-off was based, admits such testimony, for that purpose only, so that the agreement itself and such parol testimony are consistent and harmonious with each other. This theory is in accordance with Okie *vs.* Person, 23 App. D. C., 170, 181, and with the plaintiff's own testimony that the license and business was the principal thing he was after (Rec., p. 17).

Early in the trial, when the plaintiff commenced to put in parol testimony tending to show intention of the parties to include the entire tract, defendant's counsel objected, whereupon counsel for the plaintiff stated that the "testimony was to explain the contract and apply it to its proper subject-matter" (Rec., p. 9), and the court instructed the jury to the same effect (Rec., p. 54, top).

Parol evidence to identify the property described in a contract is inadmissible if inconsistent with what appears in the writing.

76 Ala., 204, 209, 210, Guilmartin *vs.* Wood.
51 Ill., 198, 201, Hutton *vs.* Arnett.
124 Mich., 120, 123; 82 N. W., 808, Lawrence *vs.* Comstock.
1 How. (Miss.), 591, Carmichael *vs.* Foley.
37 Mo. App., 43, 47, N. H. Cattle Co. *vs.* Bilby.

19 N. H., 273, 278, Peaslee *vs.* Gee.
16 Ohio St., 472, 477, 478, Johnson *vs.* Pierce.
7 Ohio St., 99, 103, 106; 70 Am. Dec., 57, McAfferty *vs.* Conover's lessee.
3 Brewst., 180, 188, 189, Messer *vs.* Rhodes.
19 R. I., 25, 27; 31 Atl., 428, Coombs *vs.* Patterson.
22 Wis., 167, 169, Curtis *vs.* Supervisors.
181 Mass., 134, 135; 63 N. E., 409, Morton *vs.* Clark.
23 N. Y. Supp., 880, 882; 4 Misc., 167, Morowski *vs.* Rohrig.
And many other cases cited in 17 Cyc., 734, 748.

In 76 Ala., 209, *supra*, the court held that parol evidence may be used to explain an ambiguity, but not to show a mistake in description. That is the precise point in the case at bar. And in 23 N. Y. Supp., 882, *supra*, the court said:

> "The question of the admissibility of conversations preceding a written contract is not only a question of evidence, it is a question of contract."

Parol evidence of extrinsic circumstances, is received not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed. The duty of the court is to declare the meaning of what is written and not of what was intended to be written; keeping in view the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument.

17 Cyc., pp. 673–675, citing—
35 Ala., pp. 453, 462–469, Hughes *vs.* Wilkinson.

Even in equity:

> "In the case of an executory agreement first to reform, and then to decree an execution of it, would be virtually to repeal the Statute of Frauds."

This is the language of Baron Alderson, in Attorney-General *vs.* Sitwell, 1 Y. & C., 559, 582, 3, cited and followed in Osborn *vs.* Phelps, 19 Conn., 63, 73, *supra.*

But in the case at bar the plaintiff is even more bold. He seeks, in a suit at law, to have a written agreement for the sale of land reformed by the aid of parol testimony and to obtain damages for an alleged breach previously committed. Anticipating such reformation by a jury, he declares upon an alleged contract in writing for the sale of the entire tract and alleges a breach thereof by the defendant. Then at the trial he fails to produce the contract alleged by him to have been made and broken, but in lieu thereof he produces a contract which the defendant has been ever ready, able, and willing to perform and which calls for only a part of the tract. And thereupon the jury, under the guidance of the court, constructively reform the written contract to make it conform to the plaintiff's views and mulct the defendant $1,250 as a reminder that by their verdict the Statute of Frauds has been repealed and that equity jurisdiction is being administered from the jury box.

II.

Testimony for Plaintiff as to Amount of Damages.

The difference, if any, between $12,000 and the fair market value of the property included in the contract, at the time of the breach, was conceded by the parties and held by the court to be the measure of damages (Rec., pp. 56, 55, 57).

The plaintiff offered no proof of the value of the real estate, either separately or taken together with the license, fixtures, and business, but was permitted to adduce, subject to exceptions, testimony tending to show that the business alone was worth from $10,000 to $15,000 (Plff. Rec., p. 15; Montague, Rec., p. 25; Helwig, Rec., p.

26). All this testimony was elicited by hypothetical questions in which it was assumed, as a basis of calculation, that the daily receipts in the business were $75, and $125 on Saturdays; being $500 per week.

The only testimony adduced by the plaintiff tending to lay such a basis, was that of himself (Rec., p. 14) and his agent, Andrew Loffler (Rec., pp. 21, 22), introduced subject to exceptions, to the effect that the defendant, before signing the agreement, had told him the amount of business he was doing there was "$75 a day and some Saturdays $125" (Rec., p. 14). This testimony was objected to as irrelevant and inadmissible.

But, upon cross-examination, the plaintiff was asked—"Why didn't you make further inquiry as to the receipts of that business?" to which he replied, "Well, I said a while ago, I am familiar with the place out there, and I did not care anything about it because I knew just about what he did out there. I was pretty well acquainted. I knew as much about it as Harten did" (Rec., p. 18). It further appeared from the plaintiff's own testimony that the alleged statement as to receipts was voluntary on the part of the defendant. In reference to the receipts the plaintiff testified, "I did not ask him any questions at all" (Rec., p. 17).

Thereupon (Rec., p. 22), the defendant moved to strike out said testimony as to what the defendant said as to the receipts from the business, upon the ground that it appears by the plaintiff's own testimony that he did not rely and had no reason to rely thereon, but had abundant opportunity to ascertain for himself.

Exceptions were duly noted (Rec., pp. 14, 21, 22) to the action of the court in admitting the testimony and denying the motion to strike it out.

The defendant testified that he never told the plaintiff anything to that effect or anything concerning the amount of the receipts (Rec., p. 39, middle), and also introduced

a book kept by him showing the receipts to average, not $500 per week, but less than $150 per week (Rec., pp. 47, 48), which according to the testimony of the plaintiff himself, would prove that there was no value to the business (Rec., p. 18, top).

The book was the best evidence. If that were not so, the plaintiff's own testimony that he "knew as much about it as Harten did" (Rec., p. 18) would have qualified him to testify directly of his own knowledge as to the amount of the receipts; but he carefully avoided doing so.

Assuming that the defendant made such a statement, it appears by the plaintiff's own testimony to have been made casually, carelessly, gratuitously, and without affecting or being intended to affect pending negotiations. The plaintiff did not rely upon it; was not misled by it; but relied on his own knowledge and then failed to testify of his own knowledge.

Thus, having better evidence available, the plaintiff should not have been permitted to rely upon the alleged statement of the defendant or to let it go in evidence to the jury.

The plaintiff was allowed to testify that, relying upon his contract with the defendant, he sold out the saloon business he was then conducting in Georgetown, and that the same was profitable, and that he thus remained out of business for five months; to all which exceptions were duly noted (Rec., pp. 14, 15).

It had no bearing upon the questions at issue and could have no effect except to prejudice the defendant in the minds of the jury, and this error probably was not remedied by the fact, afterward established by the defendant, that the plaintiff's contract for the sale of his own place did not require him to give that up if he failed to secure the defendant's business (Rec., p. 34).

The plaintiff was allowed to testify, subject to exceptions, to the effect that defendant's business, leaving out

the real estate, was worth between $10,000 and $11,000; also that the rental value of the defendant's property was $125 or $150 per month (Rec., pp. 15, 16).

There is nothing in the testimony to show him competent as an expert, and his answers indicate that the figures given by him were based upon prices and rentals in the city, without further knowledge on his part than what he had acquired in purchasing, successively, three saloon properties for his own use.

The plaintiff was allowed, subject to exceptions, to introduce testimony to prove a high rental value of the property and of the business (Rec., pp. 25, 26). The purpose of this was to increase the *quantum* of damages. All this was elicited by questions based upon the hypothesis that the receipts of the business were $500 per week, but without competent evidence to sustain the hypothesis.

III.

Exclusion of Testimony Offered by Defendant.

The plaintiff introduced the testimony of Mr. Montague as an expert in dealing with saloon properties and values (Rec., p. 25). Later he was called as a witness by the defendant and asked the value of the entire tract and business (excluding stock in trade), being all the plaintiff claims under the agreement; but his testimony was excluded though clearly competent.

IV.

The defendant was entitled to each of the instructions requested by him (Rec., pp. 51, 52).

The first was requested upon the theory that there was no competent evidence in the case to sustain a verdict against him. The plaintiff had failed to produce a written agreement such as he had alleged and such as the statute required. The written agreement introduced

by the plaintiff was a variance from the declaration, and he relied on parol testimony not only to make out his case but also to impeach the written agreement.

The Instruction II was based upon the theory that the plaintiff had failed to make out a case and that the only question turned upon the plea of set-off. The record sustains this contention. The value of the entire tract was only $4,380 (Rec., p. 31). The average receipts did not exceed $150 per week (Rec., pp. 47, 48), and at that rate there was no value to the business, according to the plaintiff's testimony (Rec., p. 18). On this showing the defendant was entitled to a verdict against the plaintiff for $7,370.

The tenth, eleventh, and fourteenth instructions appear to counsel to be good law.

The fifteenth instruction is supported by all the authorities. The last sentence in it is based upon the uncontradicted proof and the plaintiff's own testimony that the contract was prepared and written at the request of the plaintiff and that the words used were selected by his own agent for that purpose.

V.

The portions of the charge which are excepted to relate principally to the question as to the admissibility of parol testimony to eke out the plaintiff's case and the right of the jury to consider such testimony in lieu of the evidence required by the statute; such parol testimony being inconsistent with the written contract and not explanatory of it, but offered solely as a substitute for so much of the written agreement as describes the dimensions of the parcel intended to be conveyed; all in violation of the statute concerning contracts for the sale of land and of the well-established rules prohibiting the impairment of written contracts by parol testimony. As

stated by the court, "the several counts in the plaintiff's declaration are not founded upon fraud, but upon alleged breach of the written contract by the defendant" (Rec., p. 55).

The portions of the charge excepted to are indicated in the record by being inclosed in brackets, and the grounds of exception are stated at page 60. The main questions have been hereinbefore discussed.

The judgment should be reversed and a new trial awarded upon the plea of set-off.

Respectfully submitted.

LORENZO A. BAILEY,
For the Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
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CLERK.

(20,724.)

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 91.

HUGH HARTEN, PLAINTIFF IN ERROR,

vs.

ERNST LÖFFLER.

Reply Brief on Behalf of Plaintiff in Error.

This brief is in reply to the following contentions in the brief for the defendant in error, viz:

I. That the writ of error should be dismissed (pp. 1–4).

II. That the record does not disclose the fact that Richard was taken by the plaintiff (defendant in error) to Harten's place for the purpose of writing the contract or that he prepared and wrote it on behalf of the plaintiff (p. 22).

III. That the defendant Harten himself testified that the real estate and business were worth $16,000 (p. 27, bottom).

Replying to the foregoing, seriatim, plaintiff in error submits the following:

I.

1. No motion to dismiss the writ of error has been filed. Defendant in error relies on the suggestions in his brief and thus presents the question at the very last hour.

The defendant's plea of set-off, setting up the same contract in writing upon which the plaintiff's suit is founded, alleges defendant's offer and plaintiff's refusal to perform, and claims the unpaid balance of the purchase price agreed upon, $11,750.

The plea of set-off is proper under secs. 1563, 1565, Code D. C. Under section 1565 the defendant is thus "deemed to have brought an action at the time of filing such plea against the plaintiff for the matters mentioned in the plea," and the defendant is "entitled to a trial of and judgment upon his claim."

The amount in dispute is therefore $11,750, plus the amount of the judgment for plaintiff, $1,250.

Buckstaff *vs.* Russell & Co., 151 U. S., 626.
Block *vs.* Darling, 140 U. S., 234.

2. In support of his contention, defendant in error says in his brief (p. 2), that there was no evidence tending to prove an offer by defendant to perform the contract as construed by him.

The defendant testified (Rec., p. 42, bottom):

> "I told the plaintiff's agent, Andrew Loffler, four or five different times that the plaintiff could have the south 60 feet front by the 200 feet. I said, he can have it if he draws the deed according to the contract. He declined to draw the deed according to the contract and I refused to sign the paper. The first time I told Andrew Loffler that was two or three days after a little controversy when I would not sign the paper. I told him he could have it at the original agreement."

The plaintiff's attorney testified (Rec., p. 49, top) that defendant's attorney informed him, prior to suit, that Harten was willing to convey what the contract called for, 60 feet by 200 feet, but plaintiff's attorney rejected the offer. And the correspondence between the attor-

neys for the parties (Rec., p. 27), shows a refusal on the plaintiff's part to accept anything less than the entire tract.

It is unnecessary to cite authorities to sustain the proposition that the defendant, especially after such refusal on the part of the plaintiff, was not required to go further before bringing suit on the contract.

3. Defendant in error further says in his brief (p. 4) that the utmost the defendant could have recovered upon the evidence was $3,000.

The defendant's book showed the business brought in less than $150 per week (Rec., pp. 47, 48). The plaintiff himself testified that on that basis there was no value to the business (Rec., p. 18, top). Mr. Shoemaker testified that the real estate, the entire tract, was worth 25 cents per square foot exclusive of the improvements and the improvements were worth not over $2,000 (Rec., p. 31, top). This testimony which was wholly uncontradicted, fixes the value of the real estate and improvements at $4,380.

There was therefore evidence sufficient to sustain a verdict for the defendant for the difference between the unpaid balance of the purchase price ($11,750) and the value of the real estate ($4,380) amounting to $7,370, which amount, together with the amount of the judgment for the plaintiff ($1,250) is ample to sustain the jurisdiction of this court.

II.

The plaintiff himself testified:

> "I went right out with Mr. Richard in his buggy (Rec., p. 11). That contract was written by Mr. Salvador Richard (Rec., p. 12). Mr. Richard came to my place with Mr. McCullough and after I phoned out to Harten, I signed the contract with McCullough, and then I went out with Mr. Richard to Harten's place (Rec., p. 16, middle). Mr. Richard went out with me for the purpose of writing

that agreement. He took me out in his buggy. I said to him he might as well write it as anybody else and he did write it" (Rec., p. 19, middle).

Richard, a witness for the plaintiff, testified:

> "Mr. Ernst Loffler asked me to write the agreement. He asked me first when we first started out, to draw up such an agreement. I then suggested he better take a lawyer to draw up the paper in case there was a purchase, but he seemed to think that that was an unnecessary expense, relying upon my ability to draw a proper paper" (Rec., p. 23, bottom; 24, top).

III.

The facts in reference to the defendant's testimony as to value are as follows:

Upon cross-examination he was asked by counsel for the plaintiff: "In 1905 what did you consider all the real estate and the business as it stood there worth, license and all?" and, subject to objection and exception, he replied:

> "If I was selling the whole property I would take not less than $16,000 for it. I don't know what it would be worth on the market. If I was selling the entire front of it, the whole business, I would not take less than $16,000. It might not be worth more to other persons, but I would not take less than that much. Q. Is it worth that much to you? A. In years to come it might. Q. You said it was worth that on the 27th of April last? A. The reason I would not take less than that is the expectations of better times (Rec., p. 46, bottom). Q. How is it you fix the value of the property and the business at $16,000? A. The expectation of better times" (Rec., p. 47, top).

Respectfully submitted.

LORENZO A. BAILEY,
For Plaintiff in Error.

(20,724.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 91.

HUGH HARTEN, PLAINTIFF IN ERROR,

vs.

ERNST LÖFFLER.

BRIEF FOR DEFENDANT IN ERROR.

This is an action brought by defendant against plaintiff in error to recover damages for breach of a contract whereby plaintiff in error agreed to sell and convey to defendant in error as a whole his business of saloon and tavern keeper and the real estate upon which it was conducted.

In the trial of the cause at *nisi prius* the defendant in error recovered a judgment for $1,250.00, which was affirmed on appeal to the Court of Appeals of the District of Columbia.

It is submitted that the matter in dispute does not exceed the sum of five thousand dollars, and that the writ of error should be dismissed.

It is assumed that jurisdiction for this court is claimed by plaintiff in error under his second plea (R., 4), which seeks to recover the sum of twenty thousand dollars from the defendant in error by way of set-off as damages for an al-

leged failure on his part to pay the balance of the purchase price for the property.

It is submitted, however,—

1. That the proof introduced by plaintiff in error in support of his plea was insufficient to enable him to recover as for a breach of the contract.

2. That had it been sufficient his recovery in any event could not have been for an amount sufficiently large to give jurisdiction, although the damages were laid in excess of such amount in the plea of set-off.

The court is without jurisdiction of an appeal where it appears from the whole record that there cannot be a recovery in any event for an amount as large as the jurisdictional minimum, although damages are laid in excess of such amount.

For the purpose of ascertaining the actual amount in dispute, the court is not confined to the pleadings, but the whole record may be considered.

Gray *vs.* Blanchard, 97 U. S., 564.

> "It is the actual matter in dispute as shown by the record, and not the *ad damnum* alone which must be looked to."
>
> Hilton *vs.* Dickinson, 108 U. S., 165, 176.
>
> Bradstreet Co. *vs.* Higgins, 112 U. S., 227, 229.
>
> Magruder *vs.* Armes, 180 U. S., 496.

I.

Plaintiff in error offered no proof of a tender of conveyance and demand for the payment of the purchase-money or an offer on his part to comply with or carry out the contract, even as construed by him, so as to place the defendant in error in default; under no interpretation of the evidence was there such a default on the part of the defendant in error established as would have enabled plaintiff in error to re-

cover against him. This will appear on an inspection of the bill of exceptions, which purports to set forth all the testimony adduced by either party (R., 50).

II.

Under his plea of set-off, plaintiff in error introduced evidence for the purpose of showing the difference between the purchase price and the market value of so much of the property as he claimed was embraced by the contract between the parties, and under his eighth prayer (R., 57) the jury were instructed that if they found for the plaintiff in error under the plea of set-off, the measure of damages would be the excess, if any, of the purchase price, twelve thousand dollars, over the fair market value of the property.

For this purpose he offered the four witnesses, Shoemaker, Hood, Richards, and McGuire.

Shoemaker testified (R., 31) that the real estate and improvements were worth in his opinion $4,312.00, but that his opinion was based upon the value of the property "as property" having no relation to any income that may be derived from it or any business that is carried on in it or the uses to which it is put. This witness did not undertake to place a value upon the business and good will or franchise which had attached to the property by reason of the liquor license, or the real estate, business, and franchise as an entirety.

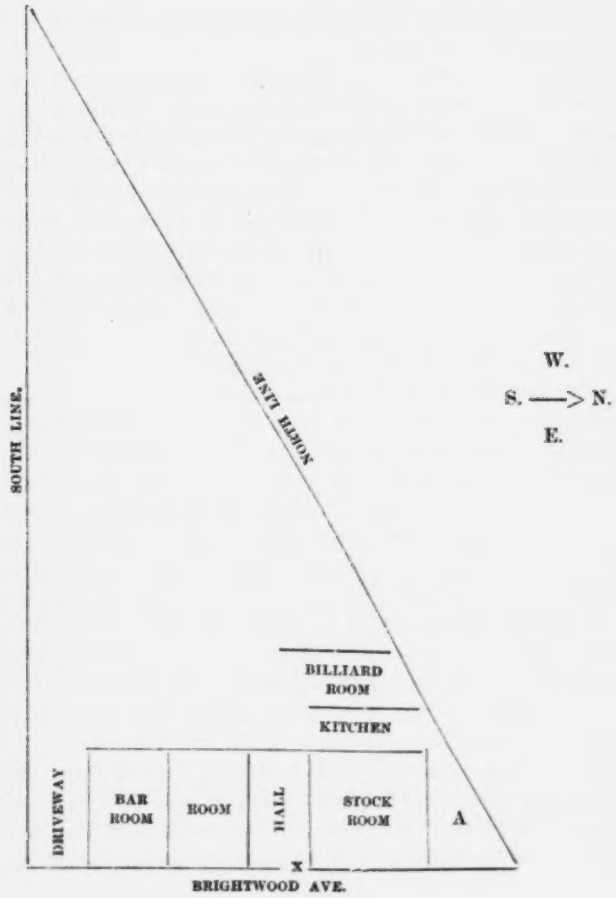
Hood testified that the *business* itself was worth at least $8,000 (R., 32); Richards, that on the basis of $150 weekly receipts the *business*, exclusive of the real estate, was worth from $4,000 to $6,000; that if the receipts averaged $50 per day the business would be worth from $5,500 to $7,000 (R., 33); and McGuire, that on the basis of weekly receipts of $150 the business would be worth $4,000; if the receipts were $60 per day its value was $7,000, and at $75 per day its value would be from $12,000 to $15,000 (R., 34-35).

Under this evidence the difference between the purchase price and the market value was at the best three thousand dollars, and this was the utmost which plaintiff in error could have recovered.

This difference is the matter in dispute, but as suggested there could have been no recovery at all by plaintiff in error.

For a number of years prior to 1905, as appears from the record, plaintiff in error was the owner of a plot of ground situate on Brightwood avenue, or the Seventh Street road, about a half mile north of the settlement known as Brightwood, in the District of Columbia, upon which he conducted a saloon and country tavern or place of entertainment; the plot of ground was triangular in shape, fronting on Seventh Street road eighty-five (85) feet; the south line of the triangle, which ran at right angles to the front line, had a depth of 224 feet, and the north line of the plot was of the length of two hundred and thirty-nine and fifty-hundredths (239.50) feet; the plot contained in all nine thousand two hundred and fifty (9,250) feet; the improvements which fronted on the road consisted of a frame building fifty-one and a half (51½) feet wide, which practically occupied the center of the front of the lot; at the northeast corner, and as part of the triangle, was a small unimproved plot having a front of thirteen and a half (13½) feet, also triangular in shape, and on the south side was a strip twenty (20) feet wide, which was used as a driveway; at the south end of the building was a room used as a bar-room; adjoining this a room used as a serving room to guests; adjoining the latter was a hallway, and adjoining this hallway in the northern portion of the house was a room arranged for and used as a store-room for the surplus stock of liquors used in the conduct of the business; above this store-room was a large room used in entertainments for guests, and known as the ball-room; the remaining upper portions of the house were used as quarters for the family of Harten. Back of the store-

room, on the north line of the premises, was the kitchen, and back of that, also on the north line, was a room used as a billiard or pool room for guests; in the rear of this billiard-room, all on the north line, were various sheds, stables, and outhouses. The comparative location of these rooms is shown on the accompanying rough ground plan.



Measuring from the south line of the plot, sixty feet north on the front line would bring the end of the line to a point in the hallway marked with a cross in the plan; by such measurement the south forty feet of the building only would be included; the north 11½ feet would be excluded, as also the small triangular strip on the extreme north of the plot marked "A."

The evidence showed that the premises were occupied and used as one by Harten.

Some weeks prior to the making of the contract sued upon, the plaintiff in error had called upon and stated to one Charles D. Hood, who is engaged in the liquor business, that he desired to sell his property and business for twelve thousand dollars ($12,000.00) (R., 10); that he would not sell his business and rent his property; that he wished to get out of the neighborhood; that the people there harassed him, and he could not do business there, and that he had difficulty in renewing his annual license because of protests; and this information was communicated by Hood to the defendant in error, who, being desirous to purchase, sent his agent to negotiate with Harten for the purchase of the property; the agent called upon plaintiff in error, introduced himself as a real-estate agent, who could obtain a purchaser for his "place," and asked him what he wanted for it (R., 19-20). Harten informed him that he asked twelve thousand dollars ($12,000.00) for the property, fixtures, and everything excepting the pool tables and stock; this the agent reported to defendant in error, and having subsequently advised Harten that he had a purchaser "for the place," he, with plaintiff in error, called upon Harten on the premises. On this occasion, which was two days before the making of the contract, Harten, knowing that Loffler was the prospective purchaser, showed them over the premises (R., 11, 17, 20).

He took them over the whole building; showed them the different rooms he had and the location and condition of the premises; he took them into the bar-room, and from the bar-room into the sitting-room, which is in the portion of the

premises designated as the old building; then into the store-room, which is designated as in the new part; then into the room above the store-room used for dances, and into the kitchen, which is back of the new part; then into the pool-room, which is back of the kitchen; and finally took them into the yard and left them there, after showing them the windmill.

On April 27, 1905, defendant in error having concluded a sale of his saloon in Georgetown, notified Harten that he was coming out to his place to "make the deal" (R., 16), and having also notified his agent, the parties met upon the premises that same afternoon. There was some discussion respecting a decrease in the price, defendant in error desiring to pay a little less sum (R., 16). The price was finally agreed upon and an agreement suggested. Mr. Richards, a wholesale liquor dealer, a mutual friend of the parties, and who had been instrumental in the sale by defendant in error of his saloon, and had driven out with him, agreed to write the agreement.

Throughout all the negotiations nothing was said by Harten that he did not intend to sell the whole of his premises, or that he intended to reserve any portion; the only thing stated as being reserved and not included in the sale was the stock of liquors and the pool or billiard tables. It is plainly evident that the parties were negotiating in respect to the business, fixtures, and realty as a whole.

In preparing the agreement, it appears that some difficulty was experienced as to a description of the real estate. Richards testified (R., 23), "I was there probably ten or fifteen minutes before I was asked to write the paper; I then wrote it; I drew up the paper, based on my knowledge and ability, just in this manner. So far as I can recollect, I wrote about as far as 'license fixtures located on Brightwood avenue near Battleground cemetery,' and I turned then and asked, *What is the size of this place?* There was a sort of general discussion that arose between Mr. Loffler and Mr. Harten and myself and the other Mr. Loffler;

some one suggested it was about 60 feet; just who that was I am unable to say; I don't remember; we all assented to that; Mr. Harten agreed and said, 'That is about right,' and the figures were put in that way." The witness further testified that nothing was said by Harten or by Loffler to indicate that only a portion of the premises were to be sold, and it was supposed that the whole of the premises was covered by the description.

The plaintiff in error testified that whilst they were discussing the front and depth of the property, so as to describe it in the agreement, Harten stated that it had about 60 feet front and about 200 feet depth (R., 12); that when Richards was writing the contract "he asked Mr. Harten how much ground is in this place." We all were guessing and Mr. Harten said, "Put it down about 60 feet front and about 200 feet deep," and Mr. Richards said, "All right, we will put it down that way" (R., 18); that when the contract had been prepared and was to be signed by Mrs. Harten, Mr. Harten called her down and said to her, "I want you to sign this contract; *I sold the place*" (R., 13); that before the contract was prepared, and when they were discussing the price, Harten said to him, "I will sell everything here except the stock, and you cannot have the stock for that money" (R., 16).

Andrew Loffler, the agent, testified that Richards agreed to write the paper. "When we came down to describe the place, Harten told him it was described in the license (R., 20); Harten brought the license in; the description in the license is 'opposite Battleground cemetery;' Richards put that down and said we should describe the property a little plainer; he said, 'What is the square number or what is the number of the lot?' Harten said, 'There is no number to the lot;' he did not know the number of the square; so he said, 'We had better put down the number of feet *you* have here;' somebody asked me what my idea was, and I said about 60 feet; I walked and looked out of the window to size it up; Mr. Loffler made a guess; and we all made a

guess; Harten said put down about 60 feet; we estimated about 60 feet front and about 200 feet deep" (R., 20-21).

Another witness, Peter J. May, testified that he met appellee and his wife at Harten's place; that Harten brought in Mrs. Loffler and introduced her to witness, and stated that Mr. Loffler had bought him out; that he had sold the whole place—everything, ground and all—and was going out of business (R., 24). That Mrs. Loffler asked witness if he had seen the house, and upon witness saying that he had not, asked him to go through it, and witness and Mrs. Loffler were shown through the house by Harten, and she laid out what she was going to do; how she was going to fix the house up. The evidence of the witness May had relation to the occurrences which took place on the day following the signing of the contract, when appellee and his wife went out to the premises, so that his wife could inspect his purchase, and were shown over the whole of the premises by Mr. Harten (R., 13, 24, 25), being carried into the various rooms, including the store-room, at the northeast corner, and ball-room over the same.

Subsequently the defendant in error proceeded to make application for the transfer of the liquor license in the premises, and for this purpose it became necessary that Harten endorse the license paper and also sign the application for the transfer, and defendant in error or his agent and attorney called upon Harten for that purpose on numerous occasions. Harten at first gave no reason for refusing to sign (R., 21); then he charged his refusal to his wife, saying he did not want family trouble (R., 21). When requested to sign by Loffler and Mr. Ray, his attorney, and being charged with attempting to back out of his agreement, he replied, "I won't sign a damn thing" (R., 14, 21).

Subsequently Loffler tendered to Harten the purchase-money and deed set forth in the record (R., 28-29). Harten did not read the deed (R., 28-42), but refused to sign. It was immediately after this interview that Harten offered the agent, Loffler, a bribe of $100 to "get me out of this" (R.,

21). No question was made as to the amount of real estate to be conveyed until the question was raised by counsel for Harten, which was some time after he had refused to comply with his contract and repudiated it (R., 49). It will be observed that although the parcel of ground contained but 9,250 square feet, Harten had entered into an agreement to sell a plot sixty (60) feet by two hundred (200) feet, containing twelve thousand (12,000) square feet of ground. The attention of the court is especially called to so much of the cross-examination of Harten as appears on pages 43-45 of the record. And upon an examination of the whole record it must be apparent that Harten, after considerable negotiation, in which no reservation or limitation respecting the real estate to be sold was mentioned or intimated, entered into agreement for the sale of his business and real esate, but that for reasons only known to himself he, within a short time thereafter, repented of his agreement and endeavored to escape compliance with his contract, using for that purpose any excuse or subterfuge which came into his mind, and finally claiming that by his contract to sell he was only required to convey a portion of the premises, and that the defendant in error was not entitled to so much of the premises as were covered by the best and main portion of the improvements, embracing among others the store or stock room of the business, the ball-room, kitchen, bath-room and billiard-room.

Here, then, was an agreement for the sale of real estate fronting "about 60 feet with a depth of about 200 feet" entered into by the parties under the circumstances detailed in the record, and embracing apparently the sale of a tract containing 12,000 square feet of ground, when in fact the whole holdings of the vendor amounted to but 9,250 square feet, the agreement apparently relating to a rectangular piece of ground, when in fact the parties were dealing in

respect to a piece triangular in shape. The agreement was for the purchase, as an entirety, of the "property, good will, license and fixtures," a sale in gross with no segregation as to the value of the several items that were embraced therein. The value of the real estate was enhanced by and depended, according to the evidence, upon the franchise or license to carry on upon the premises the saloon and retail liquor business, and as appears from the evidence its value could not be ascertained by segregating or disconnecting it from the business which is attached to the premises.

The whole question and issue between the parties was, under what circumstances and in what sense they had used the word "about" in the agreement, and to what property the agreement applied.

Was the parol evidence, the admissibility of which is questioned by plaintiff in error in his first and fourth assignments of error, admissible in the light of the facts and circumstances of this case?

The agreement between the parties was written and prepared, under the circumstances detailed in the evidence, by a person not versed in or used to such matters, and without legal assistance. In applying it, an uncertainty arose as to what was the intention of the parties, the property it applied to, and as to its meaning.

The object of the parol evidence was to place before the court the situation of the parties and all surrounding circumstances at the time the negotiations took place and the agreement was entered into, for the purpose of ascertaining the intention of the parties and effectuating such intention.

For the purpose of interpreting the agreement, parol evidence was admissible to ascertain and make plain—

I. The sense in which the parties used the word "about."

II. The identity of the subject-matter of the agreement and apply the contract to it.

III. The intention of the parties to the agreement.

I. "About."

The sense in which the parties used the word "*about*" is to be ascertained in the light of the circumstances surrounding the parties when the agreement was made. Upon investigation this will be found the rule upon which the courts proceeded in the cases cited by plaintiff in error on the interpretation to be given to the word.

It is a relative term of uncertain meaning. Says the court in Pine River Logging Co. *vs.* U. S., 186 U. S., 279, 288:

> "There is no doubt whatever of the general proposition that where the words 'about' or 'more or less' are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of wood or coal, or the cargo of a particular ship, *or a certain parcel of land*, the words 'more or less,' used in connection with the estimated quantity, *are susceptible of a broad construction*, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified."

The word "about" is construed with reference to the subject-matter and circumstances with regard to which it is used; it has a more uncertain meaning than "almost," "nearly," and etc.

> Von Lingen *vs.* Davidson, 1 Fed. Rep., 178, 186 (Dist. Court).

"About" is a relative term. It may indicate one thing when applied to one state of facts, *and another under different circumstances.* Contracts, when their meaning is not

clear, are to be construed *in the light of the circumstances surrounding the parties when they were made and the practical interpretations which they, by their conduct, have given the provisions in controversy.*

Von Lingen *vs.* Davidson, 4 Fed. Rep., 346, 350 (Circuit Court).

Lowber *vs.* Bangs, 2 Wall., 728, 737.

> "Parol evidence is not admissible to vary the terms of a written instrument, but when an ambiguity exists it may be given in aid of interpretation *to show the facts and circumstances in the midst of which the parties were acting.*"

> "These assumptions and calculations are facts in the light of which this *indefinite* word is to be read."
> Von Lingen *vs.* Davidson, 4 Fed. Rep., 350, 351.

In Indianapolis Cabinet Co. *vs.* Herrman, 7 Ind. App., 462, 467, cited by plaintiffs in error, brief, page 19, the court says:

> "When the language is uncertain or ambiguous it is proper for the court in construing the contract and the rights of the parties thereunder, to consider the situation of the parties at the time of the execution of the paper and their subsequent conduct, as giving a practical construction to it."

It is contended by plaintiff in error that the rule as to the admissibility of parol evidence, in relation to written contracts, is different so far as it is applied to a contract not within the Statute of Frauds, and one which is, by the Statute, required to be in writing, and sections twelve and fifteen of Reed on the Statute of Frauds are cited as an authority to sustain the proposition. Upon an examination it will, however, be found that the same rule, as to the admissibility of evidence, applies to both classes of contracts; that

the sections cited are only to the point, that in respect to contracts required by the statute to be in writing, a writing is necessary to give them validity or make them enforceable, which the author adds is another reason why they should not be varied or contradicted by parol, and that oral evidence to supplement a manifestly imperfect writing (one which does not embody or contain all the requisites required by the statute) is inadmissible. And finally, the author, in concluding, at section 412, says—

> "that the contradiction between the different rulings which have been cited will, upon close examination, be found to be not so great as it seems; a description which in one case would point to nothing definite, would in another identify the property admitted by the parties, or known to the court to be that in controversy, *while collateral evidence of the circumstances surrounding the transaction or of the position or doings of the parties, might cause a most general description to attach immediately to the precise property.*"

And so it is said in Browne on the Statute of Frauds, at section 409, in discussing the admission of parol evidence to affect written contracts:

> "For most purposes it may be said that the statute has neither added to nor taken from the stringency of these rules. At common law, such evidence is not admissible to contradict or vary the written agreement by showing what passed before or at the time of its execution between the parties. * * * And this is *so a fortiori* in relation to any contract which the statute required to be put in writing. On the other hand, parol evidence is admitted at common law to show the circumstances under which the parties have executed the written agreement with a view to fix its application to the subject-matter which they had in their minds. And for this purpose, as we have seen in various places of the present chapter, it is equally admissible, though the agreement be one which can not, consistent with the statute, be made with writing."

It is also contended that the agreement is not sufficient under the Statute of Frauds:

> "No special form is needed; any writing properly executed of however crude a character is enough. Anything, Lord Ellenborough said, was sufficient that was 'under the hand of the party expressing that he had entered into the agreement' set out therein."
> 1 Reed St. Frds., sec. 324.

The memorandum required by the statute *is not the contract, but only the evidence of it,* and a memorandum properly signed of a by-gone contract is sufficient.

Reed St. Frauds, sec. 325.
Bluck *vs.* Gompertz, 7 Exch. Reps., 860, 868.
Mizell *vs.* Burnett, 4 Jones Law (N. Car.), 247, 254.

> "Any note or memorandum in writing which furnishes evidence of a complete and practicable agreement is sufficient under the statute, and parol evidence is admissible to explain latent ambiguities and to apply the instrument to the subject-matter."
> Williams *vs.* Morris, 65 U. S., 444, 456.
> Barry *vs.* Coombe, 1 Pet., 640.

In the case in 1 Pet. the court, as far back as 1828, held that a memorandum in a statement of account as follows: "By my purchase of your ½ E. B. wharf and premises, this day, as agreed between us $7,578.63," and signed by the party to be charged, was a sufficient compliance with the statute so as to make the contract enforceable.

II AND III.

The rule that parol evidence is admissible in aid of a written contract for the purpose of applying it to its subject-matter, or to explain its terms, or the intention of the parties if of doubtful import is too well settled to require extended citations. The following excerpts are, however, given as being peculiarly applicable to the case at bar and as demonstrating in what manner the rule has been applied.

In Mead *vs.* Barker, 115 Mass., 413, the contract was dated "Boston" for the sale of "a house on Church street;" the plaintiff was permitted to show by parol that defendant had no house in Boston, but had one on Church street in Somerville, and that the bargain was made between the parties on the premises. Says the court at page 415:

> "When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiations took place and the writing was made are disclosed, if the meaning and application of the writing read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement."

Every valid contract must contain a description of the subject-matter, but it is not necessary that it should be so described as to admit of no doubt what it is, for the identity of the actual thing and the thing described may be shown by extrinsic evidence.

Fry Specific Perf., sec. 325, page 157, 3d ed.

To the same effect is Hurley *vs.* Brown, 98 Mass., 545, in which the agreement was for a sale of "a house and lot of land situated on Amity street"—there the plaintiff was permitted to show by parol that there was one only, of several, which the defendant had any right to convey, and that the parties had been in treaty for the sale and purchase of it, the court saying, 547-8:

> "We think that the presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate which he does not own. * * * In a deed, the words of description are, of course, intended to relate to an estate owned by the grantor. And in our opinion this is also the presumption in construing a

> contract for a future conveyance. If the party who enters into the agreement in fact owns a parcel answering the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption the words '*a* house and lot' on a street, where the party who uses the language owns only one estate, are as definite and precise as the words '*my* house and lot' would be; a description the sufficiency of which has been placed beyond all doubt by very numerous authorities.' * * * We regard the fair construction of the words to be, that they relate to a house and lot owned at the time the memorandum was signed by the parties who subscribed it."
>
> See also Slater *vs.* Smith, 117 Mass., 96, 98.

In Farmer *vs.* Bates, 83 N. Car., 387, the contract was for the sale of "one tract of land containing 193 acres more or less, it being the interest in two shares, adjoining the lands of James Barnes, Eli Robbins, *and others.*" The court after a full résumé of all the authorities held that parol evidence was admissible to identify the subject-matter of the contract, saying (302):

> "We feel disposed to uphold contracts, entered into, drawn often by persons unaided by a legal adviser and not careful and precise in the use of language when there is a reasonably sufficient description of its subject, and to give effect to what was intended but is not very clearly expressed."

In Waldron *vs.* Jacob, 5 Ir. Rep. Eq., 131; L. R., 5 Eq. 131, the vendor wrote to her solicitor:

> "I have closed with Mr. Waldron for this place."

Parol evidence was admitted to show what was meant by "this place."

In Fulton *vs.* Robinson, 55 Tex., 401, 404, the real estate was described as "a certain tract of land, being my own

headright lying on Rush Creek, in the cross-timbers," the contract was held sufficient.

> "Wherever there is a doubt as to the extent of the subject devised by will, or demised, or sold, it is a matter of extrinsic evidence to show what is included under the description, as parcel of it. Accordingly, in 1 Term. Rep., 701, Buller, Judge, said, whether parcel or not, of the thing demised, is always matter of evidence. So where a grantor in a deed described the premises as the farm on which he then dwelt, this was held to be a latent ambiguity, which might be explained by evidence *aliunde;* and evidence was admitted, that a particular piece of land, claimed under the deed, was at the time of the grant in a state of nature, uninclosed, and separate from the rest of the farm, and that the grantor remained in possession and occupied it as his own till his death—to show that it was not within the grant." 4 Day's Rep., 265. "Without attempting to do what others have said that they were unable to accomplish; that is, to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result. That in giving effect to a written contract, by applying it to its proper subject-matter, *extrinsic evidence may be admitted to prove the circumstances under which it was made;* whenever, without the aid of such evidence, such application could not be made in the particular case."
>
> Bradley *vs.* Steam Packet Co., 13 Pet., 89, 97, 99.

In its opinion in this case the court further says "that it is a cardinal rule in the construction of all contracts that the intention of the parties is to be inquired into, and if not forbidden by law, is to be effectuated."

In Atkinson *vs.* Cummins, 9 How., 479, the court says at page 486:

> "The general rule is well stated by Tindal, Chief Justice, in the case of Miller *vs.* Travers, 8 Bingh., 244, that 'in all cases where a difficulty arises in applying the words of a will or deed to the subject-

> matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate *or subject-matter really intended to be granted or devised.*'"

The same rule is announced in Whelan *vs.* McCullough, 4 App. D. C., 58, 63:

> "It is a well-settled principle in the law of evidence that parol evidence may be received in aid of written evidence, in order either to establish a particular document, *or to apply it to its proper subject-matter, or to explain it if its terms be of doubtful import;* or to rebut some presumption which affects it. Light is generally thrown upon these questions by proof *of the circumstances surrounding the parties and with reference to which the written document was made.*"
>
> Okie *vs.* Person, 23 App. D. C., 170, 182.

In Reed *vs.* Proprietors of Locks, etc., 8 How., 274, where the court had instructed the jury that if from the evidence the parties to the deed *intended to include* therein the demanded premises, they should return their verdict for the tenants, the court said:

> "It cannot be doubted, that, where a deed is indefinite, uncertain, or ambiguous in the description of the boundaries of the land conveyed, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way. *It therefore becomes a question to be decided by a jury, what was the intention of the parties to the deed.*"

If evidence of this character is admissible for the purpose of ascertaining the intention of parties *to a deed,* it, conse-

quently, is admissible in ascertaining the intention of the parties to *a simple contract.*

The authorities are collated in 17 Cyc. at pages 668-675, and the decisions are summed up as follows:

> "The parol evidence which can be admitted to explain the contract must be such as tends to show the correct interpretation of the language used, and its only purpose is to enable the court or jury to understand what the language really means.
>
> "Where the meaning of the parties is uncertain from the words used, and it is not within the power of the court to ascertain any other meaning by reference to the body of the instrument, evidence of the acts of the parties contemporaneous to and immediately prior to the execution of the instrument may properly be considered. The subsequent conduct of the parties acting under the contract, the meaning of which is doubtful, is also admissible to aid in the construction of the instrument and in determining the question of intent.
>
> "A deed or other writing should be construed with reference to the actual state of the subject-matter at the time of its execution and for that purpose extrinsic evidence may be admitted to place the court or jury in the position of the parties at the time of executing the instrument and thus enable them to intelligently interpret the language used.
>
> "The conversations and statements of the parties at the time of or just previous to the execution of the contract between them may be admissible for the purpose of aiding in the construction of the writing—conversations between and statements of the parties to a written contract after its execution have also been held admissible to explain ambiguity in the writing.
>
> "Parol evidence is admissible to show the situation of the parties and the circumstances under which the written instrument was executed for the purpose of ascertaining the intention of the parties and properly construing the writing. In other words, the court may by admitting any evidence of the extrinsic circumstances under which the writing was made, place

itself in the situation of the party who made it, and so judge of the meaning of the words and of the correct application of the language to the thing described. Such evidence is received not for the purpose of importing in the writing an intention not expressed therein, *but simply with a view of elucidating the meaning of the words employed.*"

In respect to the rule in cases of patent and latent ambiguities the result of the authorities is stated in 17 Cyc., at page 682, to be:

"The true rule with regard to patent ambiguities must be taken to be this: The patent ambiguity which cannot be explained by parol evidence is that which remains uncertain after the court has received evidence of the surrounding circumstances and collateral facts which are of such a nature as to throw light upon the intention of the parties. In other words and more generally speaking if the court, after placing itself in the situation in which the parties stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot definitely ascertain the meaning and intention of the parties from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty and the instrument is so far inoperative and void; and it cannot be sustained or rendered operative by the introduction of evidence which would necessarily have the effect of adding new terms to the writing.

"Where any doubt arises as to the true sense and meaning of the words themselves, or any difficulty as to their application to the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. In this case parol evidence is admissible *ex necessitate.*"

Plaintiff in error on page 24 of his brief makes the point that the agreement was written by Richards, "who was taken by the plaintiff to Harten's place for the purpose of writing it and who prepared and wrote it on behalf of the plaintiff." The record does not disclose such to be the fact. It appears from Richard's testimony (R., 22), that he had been instrumental in assisting the appellee to dispose of his business and drove with him to appellant's establishment; that both parties were customers who purchased their supplies of liquor from him. Richards says: "I was asked by the two parties to draw up an agreement which both of them could sign." Richards was not a lawyer or scrivener; he was simply a wholesale dealer in liquor who was interested in seeing the "deal" put through, being a creditor of Harten. True it is that about 1898 he had bought in the property at a trustee's sale, and assigned his purchase to Harten, and that since then Harten had executed a deed of trust to secure his firm, but at the time of writing the agreement in question he did not remember the metes and bounds of the property (R., 23).

The agreement was suggested by all parties; it had not been first prepared and taken to Harten's establishment for signature; after the parties had agreed upon their terms an agreement was suggested and the agreement in controversy was the result. Noonan *vs.* Bradley, 9 Wall., 394, and the authorities cited on page 16 in support of the proposition there made are not applicable to the case at bar.

Continuing, however, the quotations of the case in 9 Wall., the court says:

> "And on the further ground that when an instrument is susceptible of two constructions—the one working injustice, and the other consistent with the rights of the case—that one should be favored which standeth with the right."

The authorities cited on pages 21 and 22 of plaintiff's brief were generally cases in which specific performance was

the relief sought, and in which the courts have unanimously held that inasmuch as this remedy is in the discretion of the court, the contract to be enforced must be clear and explicit, and the property in respect to which the contract is sought to be enforced must be fully and clearly described in the instrument, so that the court may execute it by its decree.

In Glass *vs.* Hulbert, 102 Mass., 24, cited, page 21, it appears that there was an oral contract to convey an actual conveyance by deed; subsequently the vendee claimed that 17 acres of the land orally agreed to be sold had been omitted from the deed, and sought specific performance. As will appear from the opinion of the court, the contract sought to be enforced was an oral contract; there was no written memorandum thereof, except the deed conveying the property by certain metes and bounds; there was no contract to be construed. This is apparent from what the court says, at page 29:

> "As to the 17 acres in dispute the obligation to convey them rests solely in the oral contract; the defendant denies any contract which includes them. The plaintiff seeks to establish such a contract by parol evidence and enforce it. The deed itself furnishes no means of making the corrections sought for, and no evidence of the contract is relied on for this purpose; nor is it in any sense an acknowledgment of the substance of the alleged oral agreement."

Cameron *vs.* Sexton, 110 Ill. App., 381, 386, is only partly quoted on page 16. The opinion in that case continues as follows:

> "It is only when the language is obscure and doubtful that resort may be had to oral evidence of the surrounding circumstances to ascertain the intention of the parties to the deed. But this can not be had for the purpose of contradicting or varying the language actually employed."
>
> Citing Fowler *vs.* Black, 136 Ill., 363, 372.

Upon reference to the opinion in the latter case it will be seen that the court, after announcing itself as quoted in the cases last named, says, pages 372, 373:

> "But merely to enable the court to view the instrument from the standpoint of the parties who executed it and be thereby better enabled to determine the sense in which the words used were intended to be understood."

In Land Society *vs.* Smith, 54 Md., 187, cited by plaintiff in error, at page 21, the contract was for the sale of a tract containing "about 65 acres." The purpose of the parol evidence offered in that case was to prove a sale of 65 acres *without qualifying words*, and also to prove representations by the agent of the vendor that the tract contained *at least* 65 *acres*, and that such representations induced the appellee to enter into the contract. This evidence, it is conceded, was inadmissible, and was properly held so by the court. The case is also quoted by plaintiff in error as an authority upon the construction to be given the word "about." We submit, however, that the rule as announced in Logging Company *vs.* U. S., 186 U. S., 279, 288, should be followed. In the Maryland case the interpretation to be given to the word was considered for the purpose of ascertaining whether the quantity of land did or did not enter into the essence of the agreement under consideration; that this was the only purpose that the court had is apparent from an examination of the opinion, at page 203, where the court discusses the rule respecting quantity as an essence of the contract, and in such discussion, and for the purpose of ascertaining whether such was the intent of the parties, says, at page 304:

> "But what is the force and effect of the qualifying words 'about 65 acres' in this contract? Does it import that quantity was not a material part of the contract; and can the court so declare as a conclusion of law"?

And following that proposition, the court concludes that by reason of the qualifying words quantity was an essence of the contract. So that the word as then considered was interpreted simply for the purpose of the one question.

Replying to the authorities cited on pages 27 and 28 of plaintiff's brief on the question of the admissibility of parol evidence, it is conceded that such evidence is inadmissible "if inconsistent with what appears in the writing." The proposition here is, that the word "about," as used by the parties, must first be construed, and for the purposes of that construction parol evidence was admissible. The cases cited by appellant under this proposition were all cases where the language of the writing was clear and no ambiguity or uncertainty existed, and consequently parol evidence could not be admitted to contradict, vary, or alter the written instrument. As an example:

> In Guilmartin *vs.* Wood, 76 Ala., 204, cited on page 27, the description was by clear and definite metes and bounds. It was attempted in ejectment to show by parol that one of the lines was incorrectly stated in the deed as being on the "west" side of a street instead of the "east"; plainly the evidence was inadmissible.

So in Hutton *vs.* Arnett, 51 Ill., 198, and Lawrence *vs.* Connstock, 124 Mich., 120, the property (personalty) was fully described and no ambiguity existed, and so with the other cases cited which were attempts to contradict or vary, by parol, the contents of written instruments containing no ambiguities and plainly expressing the intention of the parties.

Nor is there any variance between the contract declared on and the contract offered in evidence.

Upon an examination of the three counts in the declaration it will be seen that the contract or agreement was ad-

missible in evidence under any of them, and being so admissible, the parol evidence was admissible to interpret and explain any uncertainty respecting the intention of the parties.

In Warfield *vs.* Booth, 33 Md., 63, the defendant agreed to sell to the plaintiff "his good will of practice for the sum of $1,000." It was contended that the contract varied from the contract set out in the declaration, because the latter purported to be limited in its terms to the town or neighborhood of Lisbon, whilst the written article was general and unrestrictive. The court held that the question of variance depended upon the construction of the contract; that the sale, by the defendant, of his "good will of practice" would extend no further than his practice as a physician and surgeon had extended, and that is what he agreed to relinquish in favor of the plaintiff; that it was competent to prove by parol evidence that the contracting parties were physicians so as to make intelligent the terms "good will of practice" in the contract, and to show what trade or profession was meant, and to prove that the practice of the defendant had been confined to the village of Lisbon and its neighborhood, so as to show the subject-matter to which the contract referred.

Continuing the court said:

> "For such purpose parol evidence is always admissible. Its office is not to alter or contradict the writing, but to apply it to the subject-matter, in order that it may be executed according to the intent of the parties. It is a familiar rule that 'where the agreement in writing is expressed in short and incomplete terms, parol evidence is admiseible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms' (1 Greenl. Ev., Sec. 282). The rule is thus correctly stated by Isham, J., in Noyes *vs.* Canfield, 27 Vt., 79 (85): 'Whenever an ambiguity arises from extrinsic matters, or when from the language used the object or extent of the contract can not be determined, parol

testimony is admissible to remove the ambiguity, or to ascertain the object upon which the contract was designed to operate. *It is a mere rule of interpretation to find out the meaning of the written words as the parties used them.'"*

AS TO THE 2D ASSIGNMENT OF ERROR.

The measure of damages as given by the court was in the language of plaintiff in error's fourth prayer.

Both defendant in error and Andrew Loffler testified that in the preliminary negotiations Harten represented that the receipts from his business amounted to $75.00 a day and some Saturdays $125.00 (R., 14, 22); true it is that this was denied by Harten; this, however, only raised a question of veracity; that these representations were voluntarily made by Harten is immaterial; whether they were made by him for the purpose of influencing Loffler to purchase was a question for the jury, but under all circumstances if they were in fact made it was an admission by Harten respecting an element which could be taken into consideration in fixing the market value of the business and in respect to which no one was better informed than Harten. The objection to and motion to strike out this evidence was upon the ground that Loffler did not rely upon the statement; the plaintiff's suit was not because of fraudulent representations as to the value of the business. Plaintiff in error's argument under this assignment is one which should have been addressed to the jury, but it does appear (R., 46) that Harten himself testified that the real estate and business were worth $16,000.

For the purpose of showing his [illegible] faith in the transaction Loffler testified that he sold out his own saloon so that he could carry out his agreement with appellant and remained out of business some five months. This evidence was not made the basis of any claim for damages, the measure of damages being limited by the prayers and charge of the court to the difference between the purchase price and market value.

Nor was there error in permitting defendant in error to testify as to the value of Harten's business. He testified that he had been in the retail liquor and saloon business for some seventeen years; that he had bought and sold several saloon businesses during that period; that some years prior to this purchase he had owned a saloon in the neighborhood of the Harten property, and at the time he made the purchase was engaged in the retail liquor and saloon business. It was perfectly competent for him to testify, under all the circumstances, what was the market value of the business, and it having been proved on the part of the defendant in error that Harten had made certain representations as to the proceeds derived from the business, it was, among other things, competent on the part of the defendant in error to show by the witnesses, Montague and Helwig, who were engaged in the business of buying and selling saloons and properties connected therewith and used for that purpose, what was the market value of the property in question upon that basis or upon any other basis which was properly in evidence. It will be remembered that subsequently the plaintiff in error introduced the testimony of these same witnesses and others for the purpose of showing a less value of the property based upon lower receipts.

In this connection we again remind the court that the purchase was of the business, license, good will and real estate as an entirety, and in fixing upon the market value of the property as a whole it was perfectly competent and proper that the value of all the items, one being dependent upon the other, should be presented to the jury for the purpose of ascertaining the value of the whole.

As to the 3d Assignment of Error.

As to the exclusion of the question propounded to the witness Montague (R., 32), the witness had not qualified as an expert on the value of real estate, but was simply a

broker engaged in the sale of saloon and liquor establishments; he was asked, "Suppose the receipts from Harten's business amounted to $150 to $200 a week; that the real estate was worth in the neighborhood of four thousand dollars; that the improvements—the land, buildings on it, the entire tract as described in the testimony here—*what would be a fair price to pay for that land with the buildings on it and the improvements,* and fixtures and the liquor license and good will of the business, not including the stock in trade?"

No argument is advanced here that it was error to exclude the question, but it is apparent in the first instance that the assumption of four thousand dollars as the value of the real estate was an assumption independent of the character of the business which was carried on upon the premises and to which the franchise had attached; the question was, therefore, based upon an arbitrary assumption not addressed to the market value, but what would be "a fair price;" in addition to this, witness had not qualified as an expert on the value of the real estate, and under all circumstances the exclusion of the evidence worked no prejudice to the appellant.

As to the 4th Assignment of Error.

The correctness of the appellant's first and fifteenth prayers is already covered by our reply to the first assignment of error.

Appellant's second prayer erroneously submitted to the jury the question of how much ground was necessary "for the convenient operation of appellant's business," but the refusal worked no injury to the appellant, inasmuch as the jury by its verdict found that the parties had contracted with respect to the whole property.

The third prayer was faulty because it submitted to the jury only the appellant's intention as to what the contract was intended to include, and that prayer, together with the

6th and 9th, were practically covered by the court in its instruction to the jury as to the intent of both parties and the interpretation of the contract in the light of such intent as found in the evidence.

> "Where the effect of a contract is in controversy the understanding which one party has of it as to its meaning or purport, is not evidence in his own favor and against the other party to whom such understanding was not communicated" (17 Cyc., 675).

As to the 5th Assignment of Error.

Under the authorities already submitted the charge of the court was correct.

Because the matter in dispute does not exceed the jurisdictional minimum the writ of error should be dismissed, or the judgment below should be affirmed.

Respectfully submitted,

Leon Tobriner,
For Defendant in Error.

HARTEN *v.* LÖFFLER.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 91. Argued January 26, 1909.—Decided February 23, 1909.

In an action by the vendee for damages, although the amount recovered is less than $5,000, if the vendor not only disputes the judgment but claims more than $5,000 as balance of purchase money this court has jurisdiction to review the judgment of the Court of Appeals of the District of Columbia.

Where its meaning is not clear, a contract is to be construed in the light of circumstances surrounding the parties when the contract was made and a practical interpretation given thereto. *Lowber* v. *Bangs*, 2 Wall. 728.

"About" is a relative, and frequently ambiguous, term, the precise meaning of which is affected by circumstances; and oral evidence is not inconsistent with, or contradictory of, a written contract which simply identifies property as shown on a diagram annexed thereto, and is admissible to show the intent of the parties in the light of the surrounding circumstances.

Where the vendee sues for breach of a contract to sell real estate and the benefit of the business and goodwill as well, the measure of damages is the differences between the purchase price and the market value at the time of the contract and evidence as to the value of each item is admissible.

A hypothetical question of value of property is not admissible when there is no evidence to support the hypothesis on which it is based.

29 App. D. C. 490, affirmed.

THE defendant in error, hereafter called the plaintiff, commenced this action against the plaintiff in error, hereafter called the defendant, in the Supreme Court of the District of

Columbia to recover damages for the refusal of the defendant to perform a written agreement made between the plaintiff and the defendant and his wife, by which the defendant agreed to convey certain premises on Brightwood avenue, or Seventh street, in the District of Columbia, to the plaintiff for the sum of $12,000.

The defendant denied the alleged agreement, and also pleaded a set-off to recover $20,000 damages against the plaintiff for the plaintiff's own failure to perform the agreement set up by defendant.

The plaintiff replied, denying the defendant's averments as to set-off, and the latter joined issue on plaintiff's replication.

A trial was had before a jury and terminated in a verdict for the plaintiff for $1,250, with interest on $250 from April 27, 1905, upon which judgment was entered.

Upon appeal to the Court of Appeals of the District, that court affirmed the judgment (29 App. D. C. 490), and the defendant sued out a writ of error from this court.

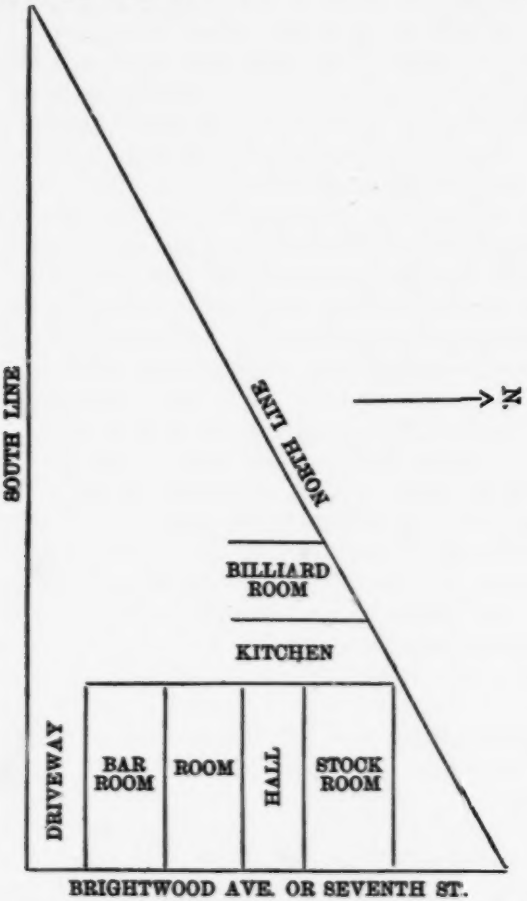
The material facts in the case are as follows:

The defendant, on the twenty-seventh of April, 1905, was the owner of a lot or parcel of land on Brightwood avenue, or Seventh street, a half mile north of Brightwood in the District of Columbia. On the date named the parties entered into an agreement, and the defendant and his wife signed the same, as follows:

"For and in consideration of the sum of twelve thousand dollars, two hundred and fifty dollars whereof is hereby acknowledged, I hereby agree to sell to Ernest Löffler the property, good will, license and fixtures, located on Brightwood avenue near Battle Ground Cemetery, fronting on Brightwood avenue about sixty feet, with a depth of about two hundred feet, title and transfer of license guaranteed or deposit refunded. I agree to use my best efforts to secure the signers for the transfer of said license and to give said Löffler a clear title to all of above property."

To understand more readily the applicability of the evidence

a diagram showing the shape of the lot and the location of the buildings is given below.



The principal questions on the trial arose in regard to the admission and exclusion of certain evidence by parol and upon exceptions taken to the charge.

The opinion of the Court of Appeals was delivered by the

late Mr. Justice McComas, who made a synopsis of the facts and evidence, which is herewith inserted:

"The defendant owned a parcel of land on Brightwood avenue, or Seventh street road, a half mile north of Brightwood in this District. He there kept a saloon and country tavern in a building erected on a lot triangular in shape, fronting eighty-five feet on Seventh street road. As appears in the diagram the front line and the south line of the triangle formed a rectangle, and the south line was two hundred and twenty-four feet long. The hypothenuse, or north line, was two hundred and thirty-nine and a half feet long. The improvements fronted on the Seventh street road and comprised a frame building standing fifty-one and a half feet along the road. At the northeast corner was a small lot of ground with a front of thirteen and a half feet, the house line running back at right angles nearly joined the north line, making this lot a triangle. On the south side was a driveway about twenty feet wide. At the south end of the building was a bar-room and adjoining it on the north was a serving room for guests. A hallway came next on the north and on the north side of the hall was a store room for liquors, above which on the second story was a ball room. The remaining upper rooms of the house were used as living rooms for the family of the defendant. Back of the store room on the ground floor on the north line of the premises was a kitchen, and in the rear of that on the same north line was a billiard room for guests. In the rear of these structures, and all adjoining the north line, were various stables, sheds, and out-houses.

"Beginning at the south line of this parcel of land, if one measured sixty feet northward on the front line, the end of the sixty foot line was at a point in the hall doorway near the middle thereof, and only the south forty feet of the building would be included within the sixty feet while eleven and a half feet of the north end of the building and a small triangular lot before described would be excluded. All the premises were occupied and used in their entirety by the defendant.

"From the record, it appears the defendant told Charles D. Hood, a liquor dealer, that he wished to sell his property and business for twelve thousand dollars; that he wished to get out of the neighborhood because he could not do business there and the protests made it difficult to renew his license. Hood communicated this information to the plaintiff, who sent his agent to purchase the property. This man introduced himself as a real estate agent to the defendant and asked him what he wanted for the place, and the defendant said he would take twelve thousand dollars for the property, fixtures, and everything excepting pool tables and stock. Later this agent called with the plaintiff, who came as a prospective purchaser, and the defendant with knowledge of that conducted the plaintiff over the premises, showing him over the whole building, upstairs and downstairs and into the kitchen and billiard room.

"Several days later, on April 27, 1905, after the plaintiff had sold his saloon in Georgetown, he notified the defendant that he would visit him to 'make the deal,' and the two parties and this agent met on the premises the same afternoon. The price asked by the defendant was finally agreed to and it was agreed that Mr. Richard, a wholesale liquor dealer, a friend of both parties, who had helped the plaintiff to sell his saloon and had driven out with him, should write the agreement.

"During these negotiations, the defendant did not suggest that he did not intend to sell the whole premises or that he intended to reserve any portion, but said that the stock of liquors and the pool or billiard tables were not included in the sale. Richard wrote the following paper, which was signed by the defendant and his wife.

[It is the agreement above set forth.]

"Richard testified when he had written as far as 'license—fixtures located on Brightwood avenue near Battle Ground Cemetery' he turned and asked, 'what is the size of this place,' and there followed a discussion between the two Löfflers, Harten and himself. One of the party suggested it was about sixty feet and Harten said 'that is about right,' and Richard so wrote

it. Nothing was said by Harten or by Löffler to indicate that only a portion of the premises was to be sold and it was understood that the whole of the premises was covered by the description.

"The plaintiff testified that in this discussion the defendant stated that the lot had about sixty feet front and about two hundred feet in depth; that when Richard was writing the contract 'he asked Mr. Harten how much ground was in this place. We all were guessing and Mr. Harten said put it down about sixty feet front, and about two hundred feet deep, and Mr. Richard said all right, we put it down that way.' That when the paper had been prepared, Harten called to Mrs. Harten and said to her 'I want you to sign this contract, I sold the place.' Before the contract was prepared, and while they were discussing the price, the defendant said to the plaintiff 'I will sell everything here.'

"Andrew Löffler, the agent, testified that when we came down to describe the place, Harten told him it was described in the license. Harten brought the license. The description in the license is opposite 'Battle Ground Cemetery.' Richard put that down and said we should describe the property a little plainer; he said, 'what is the square number or what is the number of the lot;' Harten said, 'there is no number to the lot;' he did not know the number of the square, so he said, 'we had better put down the number of feet you have here.' Somebody asked me what my idea was, and I said about sixty feet; I looked out of the window to size it up; Mr. Löffler made a guess, and we all made a guess. Harten said put it down about sixty feet; we estimated about sixty feet front and about two hundred feet deep.

"Peter J. May testified that he met the plaintiff and his wife at Harten's place on the day after the sale and Harten stated that Löffler had bought him out, that he had sold the whole place, everything, ground and all, and was going out of business, and this witness and Mrs. Löffler were shown through the house by Harten, who then described how she was going to fix up the

house, and Harten conducted them into many rooms, including the liquor store room and the ball room above it. Later, the plaintiff asked the defendant to indorse the license paper and sign the application for its transfer. The plaintiff or his agent or attorney frequently repeated this request. Harten always refused to sign, at one time saying he did not want family trouble. Finally, when urged by the plaintiff and his attorney and being charged with attempting to back out of his agreement, the defendant replied 'I won't sign a damn thing.'

"Subsequently the plaintiff tendered to the defendant the purchase money and a deed of the premises, and without reading it the defendant refused to sign, and immediately after offered to the agent, Löffler, a hundred dollars 'to get me out of this.'"

Mr. Lorenzo A. Bailey for plaintiff in error.

Mr. Leon Tobriner, for defendant in error, submitted.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The defendant in error objects that this court is without jurisdiction on the ground of the amount in controversy not being sufficient. Taking the pleadings, the evidence given, and the verdict of the jury, it would seem that the amount in dispute is sufficient to give this court jurisdiction. In his set-off the defendant claims the unpaid balance of the purchase price for the property agreed upon, which unpaid balance amounted to $11,750, and he claims that sum now, and he also claims that the amount of the judgment against him of $1,250 is erroneous, and that a reversal of this judgment will permit him to claim before a jury on another trial the full amount of his set-off, or at least the balance due for the purchase price. We think the court has jurisdiction. *Block* v. *Darling*, 140 U. S. 234; *Buckstaff* v. *Russell & Co.*, 151 U. S. 626.

The objection made by the defendant to the oral evidence goes to its being contradictory to or inconsistent with the written agreement. The defendant maintains that the admission of such evidence was contrary to the rule on that subject. We agree with the Court of Appeals that the evidence was properly admitted. The tendency and purpose of the whole evidence were simply to show the circumstances existing at the time when the contract in question was executed, and to identify the premises, and to give point and meaning to the word "about" as contained in the contract. "About" is a relative and frequently ambiguous term, and its precise meaning is affected by circumstances existing when the word is used in a contract, and known to and recognized by the parties. The evidence was not inconsistent with, nor did it contradict, the written contract, but when a diagram of the premises is shown it plainly appears that the word "about," with reference to the width of the premises on Brightwood avenue, left an ambiguity in the contract which it was perfectly proper to explain by oral evidence. The oral evidence identified the premises and gave point and certainty to the meaning of the word. In *Lowber* v. *Bangs*, 2 Wall. 728, 737, it was said that contracts where their meaning is not clear are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they by their conduct have given to the provisions in controversy. Taking these existing circumstances and that interpretation into consideration, it is seen that the identification of the premises is made clear by the oral evidence, and it is also plain that the word "about" must extend the sixty-feet limit to the north end of the premises. It never could have been the idea of either party that the building should be cut in two, and certainly no language was used which set forth such unusual meaning. Cases are almost innumerable upon the subject of oral evidence in connection with written instruments, but we are satisfied the rule was not infringed by the introduction of such evidence in this case. The opinion of the Court of Ap-

peals is satisfactory and nothing more need be added upon the subject.

Fault is found with the admission of evidence in regard to the measure of damages. The rule was correctly stated by the trial court to be the difference between the purchase price and the market value at the time of the contract of sale. In the opinion of the Court of Appeals it was stated that as the contract of purchase intended not only the real estate, but also the benefit of the license, the business and the good will, it was proper to give evidence of the value of each of them, and this was the purpose of certain evidence, which was properly admitted.

The exclusion of the evidence of the witness Montague when called by the defendant with reference to the value of the property was not error, because there was absolutely no evidence whatever to support the hypothesis stated in the question. The question assumed as a fact that the business amounted to $150 or $200 a week, and that the realty was worth only $4,000 with the improvements, the land and buildings on it, and then the question was put, "What would be a fair price to pay for that land with the improvements and fixtures, and the liquor license and good will of the business, but not including any of the stock in trade?" The question assumed the value of the greater portion of the property sold.

We have carefully looked through the record and find that the other exceptions taken by the plaintiff in error upon the trial are plainly unimportant and immaterial.

The judgment must be

Affirmed.